119 (1)

No.

In the
SUPREME COURT OF THE UNITED STATES

ALLIANCE FOR COMMUNITY MEDIA, ET AL.

Petitioners,

v.

UNITED STATES OF AMERICA;
FEDERAL COMMUNICATIONS COMMISSION

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1984, Congress adopted the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 *et seq.* (the "Cable Act"), which reserved solely to state and local governments the right to issue cable franchises authorizing cable operators to place cable systems on local and state property. 47 U.S.C. § 541(a)(1). In 1992, Congress amended the Cable Act to provide that "a franchising authority . . . may not unreasonably refuse to award an additional competitive franchise," and to provide for a court appeal of any such refusal. *Id.*

1. In light of constitutional restraints and the Communications Act's express limitations upon FCC authority, did the Sixth Circuit err in finding that Section 201(b) of the Communications Act authorizes the FCC to implement 47 U.S.C. § 541(a)(1) by deeming a local franchise granted or by otherwise controlling state or local franchising processes?

2. Did the Sixth Circuit err in finding that under *Chevron USA v. NRDC*, 467 U.S. 837 (1984), the phrase "unreasonably refuse," coupled with a court remedy, permits the FCC to set franchise terms, control franchising procedures, and deem local franchises granted?

3. Did the Sixth Circuit err in finding that substantial evidence supports the FCC's Order, where the court failed to consider "whatever in the record fairly detracts" from evidence relied upon by the FCC, as required by *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)?

PARTIES TO THE PROCEEDING

Petitioners are the Alliance for Community Media; the Alliance for Communications Democracy; the National Association of Telecommunications Officers and Advisors; City of Los Angeles, CA; City of Dubuque, IA; Carroll County, MD; Montgomery County, MD; City of White Plains, NY; City of Charlotte, NC; Greater Metro Telecommunications Consortium; and the New Jersey Department of the Public Advocate, Division of Rate Counsel.

Respondents are the United States of America and the FCC.

The Sixth Circuit consolidated various petitions for review under Docket # 07-3391. Other parties in the consolidated cases include: National League of Cities; United States Conference of Mayors; National Association of Counties; City and County of San Francisco, CA; City of Wilmington, DE; City of Tampa, FL; City of Chicago, IL; City of St. Louis, MO; Anne Arundel County, MD; City of Boston, MA; Charles County, MD; Villages of Larchmont and Mamaroneck, NY; Town of Mamaroneck, NY; City of New York, NY; City of Laredo, TX; Fairfax County, VA; City of Milwaukee, WI; State of Hawaii; National Cable & Telecommunications Association; Ad Hoc Telecom Manufacturer Coalition; Qwest Communications International, Inc.; U.S. Telecom; Verizon; and AT&T.

RULE 29.6 STATEMENT

No parent or publicly held company owns 10% or more of the Alliance for Communications Democracy, the Alliance for Community Media, the Greater Metro Telecommunications Consortium, or the National Association of Telecommunications Officers and Advisors. No other Petitioner is a nongovernmental corporation.

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PETITION FOR A WRIT OF CERTIORARI

The above-named Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION AND ORDER BELOW

The FCC order subject to the Petitions for Review, *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992* (the "Order") (App. C, *infra*) is published at 22 F.C.C.R. 5101 (2007).

The court of appeals' opinion denying the Petitions for Review (App. A, *infra*) is published at 529 F.3d 763.

JURISDICTION

The court of appeals entered its judgment (App. B, *infra*) on June 27, 2008. The court of appeals denied a petition for rehearing or rehearing *en banc* by an order dated October 29, 2008 (App. D, *infra*). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are set out in the appendix (App. E,

infra). The relevant constitutional provisions are: U.S. Const. amend. V and U.S. Const. amend. X. The relevant statutory provisions are: 47 U.S.C. § 151; 47 U.S.C. § 152; 47 U.S.C. § 201; 47 U.S.C. § 224; 47 U.S.C. § 303; 47 U.S.C. § 522; 47 U.S.C. § 541; 47 U.S.C. § 542; and 47 U.S.C. § 555.

STATEMENT OF THE CASE

This case involves an important question concerning the FCC's claim of jurisdiction under the Cable Act over state and local governments and their property.

In this case, the FCC has read the statutory command in Section 621(a)(1) that a local government may not "unreasonably refuse to award" a competitive cable franchise (a command expressly tied to judicial review) as empowering it – a federal administrative agency – to control local franchising procedures, to establish the reasonableness of local franchise terms and conditions, and to issue local franchises by deeming franchises granted. The FCC uncovers all of these powers in the phrase "unreasonably refuse" despite the fact that the Cable Act does not give the FCC a role in the local franchising process, and despite the fact that Section 621(a)(1), the specific provision on which the FCC grounded such authority, gives courts, not the FCC, the right to resolve franchising disputes. Until the FCC issued its Order, the agency had never claimed such authority over state or local governments. The Sixth Circuit denied Petitions for Review that

challenged the agency's authority and the reasonableness of the regulations it adopted.

A. Statutory Framework.

To provide service in a community, a cable system uses and occupies rights-of-way that are the property of state and local governments. The state and local governments control this property and issue permission to use and occupy it through the exercise of legislative power. *City of Dallas v. FCC*, 165 F.3d 341, 345-46 (5th Cir. 1999). The permission given to cable operators to place cable systems in the rights-of-way typically takes the form of a franchise, which, once accepted, constitutes a bilateral contract between the franchising authority and the franchised cable operator. 1 C. Ferris & F. Lloyd, Telecommunications Regulation ¶ 13.14 [1] (2005).

Prior to enactment of the 1984 Cable Act, Pub. L. No. 98-549 (1984), the FCC regulated cable in the exercise of its ancillary jurisdiction over broadcasters. *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). The FCC did not issue, or claim the authority to issue, franchises to cable systems authorizing use of state and local property. Instead, consistent with the rights of states and localities to control their property, the FCC recognized a "dual regulatory regime" under which states and localities granted franchises, while the FCC regulated "operational aspects" of cable television service, *City of New York v. FCC,* 486 U.S. 57 (1988); *NCTA v. FCC*, 33 F.3d 66, 68-69 (D.C. Cir. 1994). This dual

regime was also consistent with the reach of the FCC's authority under the Communications Act of 1934 as amended, 47 U.S.C. § 151 *et seq.*, which extends to the regulation of "interstate and foreign commerce in communication by wire and radio," and persons "engaged within the United States in such communication." 47 U.S.C. §§ 151-152.

In the Cable Act, Congress amended the Communications Act to delineate "the authority of Federal, state and local governments" to regulate cable. H.R. Rep. No. 98-934, 1984 U.S.C.C.A.N. 4655, 4659. One of the central choices made by Congress was to leave "franchising to state or local authorities," *New York*, 486 U.S. at 61. This choice was reflected in Section 621(b)(1), which requires cable operators to obtain a franchise; and Sections 602(9) and (10), 47 U.S.C. §§ 522(9)-(10), which, respectively, define a franchise as an authorization to use property granted by a franchising authority, and define "franchising authority" so that only state and local governments are authorized to issue cable franchises for state and local property.[1] Congress intended to fix responsibility for franchising firmly at the local level, so that it would not be "continually altered by Federal, State and local regulation." 1984 U.S.C.C.A.N. at 4661; *ACLU v. FCC*, 823 F.2d 1554, 1559 (D.C. Cir. 1987).

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[1] Congress explained that Section 602(10) also permits a federal agency authorized to do so to issue a cable franchise for federal property that the agency controls (military bases being an example). H.R. Rep. No. 98-934, 1984 U.S.C.C.A.N. 4655, 4682 (1984).

The Cable Act's legislative history discusses the Congressional policy choice underlying this allocation of authority over cable. Congress wished to ensure "that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2). Congress found that "city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs." 1984 U.S.C.C.A.N. at 4661. Accordingly, the Cable Act continued "reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process." *Id.* at 4656. The Act permits local governments, on a case-by-case basis, to investigate local cable-related needs and interests, and then to issue requests for franchise proposals that require operators to address those needs and interests.[2]

As initially enacted, the central provision at issue in this case, Section 621(a)(1), allowed local

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[2] LFAs may issue a "request for proposals" for initial or renewal franchises that contain, *inter alia*, "requirements for capacity for public, educational and government use (47 U.S.C. § 531(a)); and requirements for "facilities and equipment" (47 U.S.C. § 544(b)), including requirements for "channel capacity, system configuration and capacity . . . and any other facility or equipment requirement, which is related to the establishment and operation of a cable system, including . . . studios and production facilities, vans and cameras for PEG use." 1984 U.S.C.C.A.N. at 4705; *see also id.* at 4660.

and state franchising authorities to decide whether to issue one or more franchises for a particular area. In 1992, Congress amended Section 621(a)(1) to add:

> A franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction; *except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 635 for failure to comply with this subsection.*

P.L. No. 102-385 § 7, 106 Stat. 1460 (emphasis added). Congress simultaneously amended Section 635, 47 U.S.C. § 555, to permit an operator to commence an action in state or federal court within 120 days of receiving notice of an adverse franchising decision. The legislative history does not indicate that the amendment of Section 621(a)(1) was intended to alter Congress's 1984 allocation of franchising authority to state and local governments. Instead, it reaffirms that the Cable Act "clarified a system of local, state and Federal regulation" and was intended "to create a statutory balance" emphasizing reliance on local franchising processes

"as the primary means of cable television regulation." H.R. Rep. No. 102-628 at 29. The FCC never adopted regulations implementing Section 621(a)(1), or suggested that it could do so, until it adopted the Order.

B. The FCC Order.

In November 2005, the Commission issued a Notice of Proposed Rulemaking to determine whether local franchising authorities ("LFAs") were unreasonably refusing to award competitive franchises and whether it should adopt regulations implementing Section 621(a)(1). *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 20 F.C.C.R. 18581 (2005). In 2007, the FCC issued the Order, which applied only to new cable market entrants.[3]

In the Order, the FCC concluded that the local franchising process itself was delaying competitive entry. This was because "the franchising process differs significantly from locality to locality," Pet. App. 72a ¶ 14, so that providers often "must become

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[3] The FCC subsequently issued an order, *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, Second Report and Order*, 22 F.C.C.R. 19633 (2007) ("Second Order"), which extended some of the Order's rules to incumbent operators. This Second Order is on appeal and subject to limited petitions for reconsideration. That proceeding does not affect this petition.

familiar with all applicable regulations" in more than one jurisdiction. *Id.* 74a, ¶ 15. The FCC noted that while some states have recently reformed their franchising processes to provide "more uniformity," other states have not. *Id.* 75a-77a, ¶¶ 16-17. The Commission concluded that there had been significant local abuses of the franchising process. *Id.* 80a, ¶ 20.

Based on these findings, the FCC decided it was necessary to reform the local franchising process. *Id.* 78a, ¶ 18. While the FCC asserted the authority to regulate states and localities, the FCC concluded the record did not justify adoption of rules directly regulating states, or localities in states that controlled the exercise of cable franchising authority. *Id.* 56a, ¶ 1, n.2.

The FCC concluded that it was authorized to reform the local franchising process under Section 621(a)(1) through its rulemaking power in Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), "reinforced by" Sections 2, 4(i) and 303(r). *Id.* 123a-140a, ¶¶ 53-64. Moreover, the FCC found that, pursuant to this authority, it could and should (a) define franchise procedures and deadlines that state and local governments would be required to follow, *id.* 141a, ¶ 67; (b) preempt public hearing requirements and other requirements on which local legislative authority depends, *id.* 150a, ¶ 73; (c) define what franchise requirements were unreasonable and reasonable, without regard to local conditions, *id.* 140a-199a, ¶¶ 65-124; and (d) exercise

remedial authority to deem a franchise granted on the terms proposed by the franchise applicant, at least temporarily, if a franchising authority failed to comply with the FCC's rules, *id.* 154a, ¶ 77. While the FCC recognized that under the Cable Act franchising authority lies with states and local governments, *id.* 62a, ¶ 6 n.8, it concluded that its "broad authority" to adopt rules gave it power to deem franchises granted, and that ultimately, "[a]lthough we have determined that local authorities ought to have the widest scope in franchising cable operators, *the final responsibility is ours.*" *Id.* 157a, ¶ 79 (FCC's emphasis).

The Order specifically addresses five issues:

1. Time Limits & "Deeming a Franchise Granted." Franchising authorities must act on a complete franchise application within 90 days for an entity with existing access to the LFA's rights-of-way, *id.* 147a, ¶ 71, and 180 days for all other applicants. *Id.* 149a, ¶ 72. If the LFA fails to act within these limits, "the LFA will be deemed to have granted the applicant an interim franchise based on the terms proposed in the application." *Id.* 154a-155a, ¶ 77. The FCC preempted any local laws respecting voting, notice, public hearing, and other predicates for local legislative actions granting a franchise to the extent those prevented a locality from meeting the FCC's new deadlines. *Id.* 150a, ¶ 73.

2. ***Build-out.*** The FCC placed limits on local authority to require an applicant for a second franchise to agree to "build out" its system throughout a community. *Id.* 159a-169a, ¶¶ 82-93.

3. ***Franchise Fees.*** The FCC issued rules interpreting Section 622, the franchise fee provision of the Cable Act. *Id.* 169a-187a, ¶¶ 94-109.

- Section 622(g)(2)(D) excludes from the franchise fee cap "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages." Those "incidental" charges can be collected in addition to the franchise fee. The FCC ruled that the specific list appearing after the word "including" was exhaustive, except for "minor" expenses. Among other things, anything other than clerical processing fees was deemed non-incidental. Legal costs and consulting costs associated with conducting studies to identify community needs were specifically treated as non-incidental, and must be paid for by the franchising authority. *Id.* 178a-181a, ¶¶ 103-04.

- The FCC ruled that any LFA requests for "in-kind contributions that are unrelated to the provision of cable services" are subject to the franchise fee cap. *Id.* 185a, ¶ 108.

Additionally, the FCC interpreted Section 622(g)(2)(C), which excludes from the "franchise fee" any "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities." 47 U.S.C. § 542(g)(2)(C). *Id.* 186a, ¶ 109.

- The FCC ruled that "a cable operator is not required to pay franchise fees on revenues from non-cable services." *Id.* 174a, ¶ 98.

*4. **Public, Educational, and Governmental Access.*** Section 621(a)(4)(B) provides that an LFA "may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support." 47 U.S.C. § 541(a)(4)(B). The FCC interpreted the word "adequate" to mean "satisfactory or sufficient," not "significant." Pet. App. 189a, ¶ 112. The FCC ruled that "it is unreasonable for an LFA to require a new entrant to provide PEG support that is in excess of the incumbent cable operator's obligations," even if the new entrant's franchise would cover a very different time period than the incumbent's, and regardless of changes in community needs since the incumbent's franchise was granted. *Id.* 196a, ¶ 120.

*5. **Mixed-Use Networks**.* Finally, the FCC assessed an LFA's regulation of cable systems that were used to deliver multiple services and

concluded that "an LFA may not use its video franchising authority to attempt to regulate a LEC's entire network beyond the provision of cable services." *Id.* 198a, ¶ 122.

The FCC concluded that by definition, a violation of any of the rules or any part or its Order would be an "unreasonable refusal" to issue a franchise within the meaning of Section 621(a)(1). *Id.* 200a, ¶ 125a.

Commissioners Adelstein and Copps dissented, finding that the Order exceeded the FCC's authority, was inconsistent with the basic structure of the Cable Act, and was unsupported by the record. *Id.* 287a, 292a.

C. The Sixth Circuit Appeal.

The Order was appealed by numerous parties pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2344. On April 10, 2007, the petitions were consolidated in the Sixth Circuit.

The Petitioners raised both statutory and constitutional objections to the rules. On June 27, 2008, the Sixth Circuit released an opinion and judgment denying the Petitions for Review. Pet. App. 1a, 53a.

The Sixth Circuit first addressed the FCC's authority to adopt the rules. It stated that Section 621(a)(1) "is silent" as to the FCC's role "in the process of awarding cable franchises." Pet. App.

19a. Given that silence, the Sixth Circuit found that *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), compelled the conclusion that the Commission could adopt cable franchising regulations pursuant to Section 201(b) of the Communications Act, which provides that the Commission "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."

Satisfied that the FCC had jurisdiction, the court applied *Chevron USA v. NRDC*, 467 U.S. 837 (1984), and found that the FCC had permissibly interpreted Section 621(a)(1). Pet. App. 25a. Applying "step one" of *Chevron*, the court found that the phrase "unreasonably refuse to award an additional competitive franchise" was ambiguous, because Congress provided for judicial review of a franchising authority's decision. Pet. App. 28a-30a. The court felt that the "legislative decision to delegate to jurists the task of construing and enforcing section 621(a)(1)'s insistence on reasonableness suggests that the statutory phrase at issue is capable of multiple meanings." *Id.*

Applying *Chevron*'s "step two," the court of appeals found that the FCC's regulations, including the regulations that deem a local franchise granted and that preempt local legislative processes, were reasonable. *Id.* 30a-49a. The court did not analyze the FCC's rules in light of the specific structure of the Cable Act, or in light of the Cable Act's requirements for case-by-case local franchising.

Finally, the court examined the amount of evidence supporting the FCC's findings that the franchising process was delaying local entry, and concluded that the FCC's rulemaking activity "was rooted in a sufficient evidentiary basis." *Id.* 49a-52a.

REASONS FOR GRANTING THE WRIT

This case raises important issues as to the division of authority among "federal, state, and local authorities to regulate different aspects of cable television." *New York,* 486 U.S. at 59. As *New York* suggests, this Court has consistently granted petitions to resolve such disputes, recognizing that, because of a cable system's use of sovereign state and local property, the division of authority between the federal and state governments implicates basic principles of federalism. *Id.* For almost two decades, this Court has not been required to address the allocation of authority because the Cable Act had been interpreted – as intended by Congress – to leave control of local cable franchising and the local franchising process to states and localities, subject to review by the courts.

In the Order, however, the FCC asserts for the first time the right to deem local franchises granted; to establish terms and conditions for franchises (beyond the terms specifically prescribed elsewhere in the Act); and to control the franchising process by preempting local laws that provide for public hearings, public notice, and other incidents of the legislative process through which franchises are

issued. This Court should intervene to restore the careful balance struck by Congress in the Cable Act. Granting the Petition is also appropriate because the Order is inconsistent with decisions of this Court and other courts, which recognize that the Cable Act reserved the franchising power to state and local governments.

Within this statutory framework, the case raises three significant issues of administrative law.

First, the Sixth Circuit read this Court's decision in *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999), to mean that insertion of any new provision into the Communications Act of 1934 will *always* confer jurisdiction and broad remedial powers upon the FCC with respect to that newly added provision, no matter what the context of the provision. Hence, the Sixth Circuit deemed itself "bound" by Section 621(a)(1)'s insertion into the Communications Act to find that the Commission could deem local franchises granted, even though the Cable Act and its legislative history make clear that Congress never empowered the FCC to do so. This Court should grant this petition to make clear that the Commission's remedial authority and jurisdiction have to be evaluated not based on "insertion into the Act" alone, but by applying traditional tools of statutory interpretation – particularly where, as here, Congress's plain language and stated goals divide authority among state, local, and federal governments. The Sixth Circuit's approach calls into question limits on the

agency's authority long considered settled. *See, e.g.*, *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288 (D.C. Cir. 1975) (applying traditional tools of statutory interpretation to find that the FCC's general regulatory powers did not permit it to enforce 47 U.S.C. § 396(g)(1)(A) against the CPB).

Second, the Sixth Circuit erred at both steps of its *Chevron* analysis. First, the court incorrectly found that the "legislative decision" to permit courts to determine whether a locality had "unreasonably refuse[d]" to grant a cable franchise necessarily meant that the phrase was so ambiguous as to empower the FCC to adopt franchising rules. This is a dangerous and unlikely rule for statutory analysis. It would paradoxically mean that Congress's explicit assignment of responsibility for reviewing franchising decisions to the courts means an agency has more, not less, authority. Reading a provision for court review as a *per se* indicator of ambiguity under *Chevron* also denies the obvious: Congress may provide for court review (as here) because it wishes to have the courts resolve disputes on a case-by-case basis, and with due regard for the important federalism interests at stake. This Court should grant this Petition to clarify that a statute's inclusion of a standard for judicial review does not in and of itself mean a statute is ambiguous under *Chevron*. Had the Sixth Circuit applied standard statutory tools of construction instead of the *per se* rule, it would have concluded that Section 621(a)(1) in context is *not* ambiguous.

In applying Step 2 of *Chevron*, the Sixth Circuit rejected application of traditional analytical tools that this Court has repeatedly applied in administrative contexts. The result is an Order that squeezes into the words "unreasonably refuse" a host of substantive requirements inconsistent with the Cable Act's basic structure and plain language. For example, the Sixth Circuit upheld the FCC's rule deeming local franchises granted as a "reasonable" interpretation of Section 621(a)(1)'s instruction that a "franchising authority" shall not "unreasonably refuse to award a franchise" – while ignoring other provisions reserving franchising authority to state and local governments. *See, e.g.*, 47 U.S.C. § 522(9)-(10).

Finally, the Order makes clear that the agency would not have adopted any rules but for its finding that there were significant local abuses of the franchising power. The Sixth Circuit recognized that this finding had to be supported by substantial evidence. Pet. App. 49a. Under *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951), the Sixth Circuit therefore was obligated to review the FCC's finding taking into account not just the evidence that supported the agency, but also the evidence that detracted from the agency's conclusions. Instead, the Sixth Circuit simply considered whether there was evidence in the record to support the FCC's conclusion – precisely the test *rejected* in *Universal Camera*. The Court should grant this Petition to prevent the Sixth Circuit's misreading of *Universal*

Camera from justifying intrusions into the local franchising process.

I. Certiorari Should Be Granted To Restore the Franchising Balance Struck by Congress in the Cable Act.

A. <u>The Act Is Not Silent As to Where Franchising Authority Resides</u>.

The Sixth Circuit's conclusion that Section 621(a)(1) is "silent" as to the FCC's role "in the process of awarding cable franchises," (Pet. App. 19a), is correct in one sense: the FCC is not mentioned in Section 621(a)(1). But the Act is far from silent as to who is to award franchises and control the franchising process. The definitions of "franchise" and "franchising authority," *supra* at 4, recognize state and local governments as the only cable franchising authorities for state and local property. The legislative history, quoted above, is exceedingly clear that this division was intended, *supra* 4-6.

No other provision of the Communications Act gives the FCC authority to issue franchises for state and local property or to control the franchising process, explicitly or impliedly. Section 152 states that the provisions of the Act apply to "communications by wire" and to "persons engaged in. . . such communication," and further provides that the provisions of the Act apply to cable service, to persons engaged in providing cable service, and to the facilities of cable operators "as provided in Title

VI," the Cable Act. 47 U.S.C. § 152(a). Provisions of Title II that permit the FCC to set rates and terms and conditions for access to rights-of-way specifically exempt municipal rights-of-way from FCC control. 47 U.S.C. § 224 (FCC authorized to set rates, terms and conditions for access to utility rights-of-way, but not municipal rights-of-way).[4] The Sixth Circuit's decision is inconsistent with these explicit provisions.

Moreover, *implying* an FCC power to deem franchises granted and control the franchising process is particularly troubling because Congress's careful division of authority over cable systems between the state and federal governments has an important constitutional dimension. As the Fifth Circuit recognized, even in the *absence* of the Cable Act, state and local governments possess the authority to issue franchises because cable systems require permission to use sovereign property. *City of Dallas v. FCC*, 165 F.3d at 348. As the Fifth Circuit also recognized, but as the Sixth Circuit did not, the Cable Act affirms this pre-existing state and local authority by requiring operators to obtain franchises

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[4] The Commission long ago conceded that its authority to regulate "communications by wire" does not carry with it the authority to regulate the property used in connection with those communications, including public rights-of-way. *In re Cal. Water & Tel. Co.*, 40 Rad. Reg. 2d 419 at ¶ 15 (1977). Section 224 was added to the Communications Act after the FCC advised Congress that it did not have authority to regulate the property of third parties without an affirmative Congressional grant.

before operating a cable system. An alternative approach, under which the federal government issued franchises authorizing private parties to use and occupy state and local property, would obviously raise Fifth Amendment issues. U.S. Const. amend. V; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (cable system's occupancy of property a *per se* taking). On the other hand, directing state and local governments to grant franchises (and thereby enter into bilateral contracts) for use of state and local property would raise significant Tenth Amendment issues. U.S. Const. amend. X. "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992). In other words, the Cable Act does not merely offer states and localities a choice to regulate in accordance with federal standards, or to forego regulation altogether and leave the regulation to federal authorities. Instead, the Cable Act recognizes the independent and sovereign powers of the state and local governments and leaves cable franchising authority with states and local governments. The Sixth Circuit's failure to recognize this constitutional dimension led it to imply FCC authority where none can be implied.

B. The Sixth Circuit's Reading of the Cable Act As Empowering the FCC To Control the Franchising Process and To Deem Local Franchises Granted Conflicts with Decisions of this Court and Other Courts of Appeals.

Taking the structure of the Cable Act into account, as this Court's precedents require, the Fifth Circuit concluded that the reservation of franchising authority to localities *prevents* the FCC from preempting local franchising authority. *City of Dallas v. FCC,* 165 F.3d 341, 345-46 (5th Cir. 1999) In 1996, Congress amended the Communications Act to permit companies to provide video services via open video systems ("OVS") that shared characteristics of cable systems and common carrier systems. To foster development of video competition and reduce the regulatory burdens on OVS, Congress eliminated the federal franchise requirement that applied to cable systems, 47 U.S.C. § 573(c)(1)(C). The FCC proceeded to preempt local and state franchising requirements with respect to OVS, finding those requirements interfered with Congress's OVS goals. The FCC concluded that the federal issuance of an OVS certificate provided sufficient authority for an OVS operator to occupy state and local streets and rights-of-way – in effect, deeming its own authorization a substitute for a local franchise. The Fifth Circuit overturned the rule, holding that:

> [F]ranchising authority does not depend on or grow out of § 621. While § 621

> may have expressly recognized the power of localities to impose franchise requirements, it did not create that power, and elimination of § 621 for OVS operators does not eliminate local franchising authority.

165 F.3d at 348. Section 621 thus *recognizes* franchising authority – it does not create it, or convey local franchising authority to any other entity. Yet, here, the FCC finds its own authority *rooted in* Section 621(a)(1) and proceeds to deem local franchises granted and determine the times for actions and procedures that local authorities must follow. When the Sixth Circuit affirmed the FCC rules, it put itself at odds with the explicit provisions of the Cable Act, the decision of the Fifth Circuit in *Dallas*, as well as the decisions of this Court and other courts which recognize that the franchising power over state and local government property resides with states and localities, not the federal government.[5]

C. Granting the Petition Is Appropriate To Restore the Division of Authority Required by the Cable Act, the Constitution, and Other Courts.

This Court should grant the Petition in light of the conflicts between the Sixth Circuit's decision, the Cable Act, and the decisions of this and other

[5] *See, e.g., City of New York v. FCC,* 486 U.S. 57 (1988); *NCTA v. FCC*, 33 F.3d 66, 68-69 (D.C. Cir. 1994).

courts. Granting the Petition is particularly appropriate in light of the constitutional implications of the FCC's decision. This case raises even more starkly the concerns of members of this Court in similar settings. For example, under the reasoning of the Sixth Circuit, the Cable Act "could be said to confer on federal agencies ultimate decision-making authority, relegating States to the role of mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect." *Alaska Dept. of Envtl. Conservation v. EPA*, 540 U.S. 461, 518 (2004) (Kennedy, J., dissenting). The intent of Congress in the Cable Act was clear – and the FCC's assertion of ultimate franchising authority cannot be squared with it. This Court should grant the Petition to restore Congress's division of authority.

II. Certiorari Is Appropriate To Clarify That Section 201(b) Does Not Authorize the FCC To Exercise Franchising Authority or To Control the Franchising Process.

The Sixth Circuit concluded that this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), compelled it to find that 47 U.S.C. § 201(b) empowers the FCC to deem local franchises granted and to otherwise regulate the franchising process by defining what it means to "unreasonably refuse" a request for a second franchise. Pet. App. 20a.

The court's conclusion is rooted in a significant, and potentially far-reaching, misreading

of *AT&T*. Section 201(b) provides that the FCC may adopt regulations necessary in the public interest to carry out the "provisions of this Act." 47 U.S.C. § 201(b). In *AT&T*, the Court considered whether Section 201(b) authorized the FCC to adopt regulations regarding the common carrier interconnection and unbundling provisions at 47 U.S.C. § 251, which was added to the Communications Act by the Telecommunications Act of 1996. The Court first endorsed Justice Breyer's view that the FCC's power to rely on Section 201(b) to implement a later enacted amendment "depends upon what that later enacted statute contemplates," 525 U.S. at 420 (concurring in part, dissenting in part) – a proposition the Court found to be "assuredly true." *Id.* at 378 n.5. The Court then proceeded to assess what the later statute "determined," and did so, in part, by focusing on the provision's "insertion" into the Communications Act of 1934 which, given the nature of the provision at issue, clearly brought Section 251 within the ambit of the FCC's authority. *See also id.* (noting that Section 251(i) demonstrates Congress's awareness of Section 201(b) by referring to that section).

While "insertion" may be a strong indicator of Congress's intent to provide the FCC jurisdiction to regulate, *AT&T* never suggests that it is controlling in and of itself, regardless of what other provisions of the Act say.[6] The controlling factor is Congress's

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[6] The Court has later cited *AT&T* in cases where FCC jurisdiction was not directly at issue. In *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005), the Court cited

intent, as determined applying traditional rules of statutory interpretation.

Recognizing this paramount rule, this Court has recently emphasized that the scope of the Commission's *remedial* authority under Section 201(b) must be read in light of its "traditional, historical subject matter" – common carriers. *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 127 S. Ct. 1513, 1523 (2007).[7] The Sixth Circuit decision recognizes no

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AT&T, but "no one question[ed]" the FCC's jurisdiction. In 2006, the Court again cited *AT&T* in describing the Communications Act as an example where "the statute gives an agency broad power ..." *Gonzales v. Oregon*, 546 U.S. 243, 258-59 (2006).

[7] *Global Crossing* does not indicate whether the holding extends only to the Commission's exercise of remedial authority under Section 201(b), or whether the limitation applies more broadly to all regulations adopted pursuant to Section 201(b). Section 201(b) has generally been applied in cases that involve common carriers, or that raise issues that implicate common carrier regulation. Reading Section 201(b) to apply regardless of the nature of the issue before the agency is problematic. First, such a reading renders Sections 303(r) and 4(i) superfluous at best. The better approach is not to read these provisions as redundant, but as referring to FCC authority over different topics. Second, the reading requires the courts to ignore the limitations on the FCC's authority in Section 152 (requiring cable to be regulated as provided in Title VI) and in Section 621(c) (cable systems may not be regulated as a common carriers). Third, this reading ignores the legislative history, which shows that the 1938 amendment that inserted Section 201(b) into the Act was not designed to delegate plenary rulemaking power to the FCC. 83 Cong. Rec. 6291 (1938) (statement of Sen. White). The *Global Crossing*

such distinction. Instead, it permits the FCC to exercise its *remedial* authority to deem franchises granted, directly contrary to the language of Section 602(10) (defining franchising authority) and Section 621(a)(3) (requiring operator to obtain a franchise from a franchising authority). The Sixth Circuit more generally concludes that the mere insertion of the Cable Act into the Communications Act gives the FCC authority to control the franchising process notwithstanding Section 152 of the Act, which provides that cable is to be regulated "as provided in Title VI." We are not aware of any other decision that finds that through Section 201(b) (or any other provision) Congress delegated franchising power to the FCC over cable television, or over local governments and their property.

The proper approach is illustrated by the D.C. Circuit's decision in *Accuracy in Media, Inc., v. FCC*, 521 F.2d 288 (D.C. Cir. 1975). There, the court of appeals considered the FCC's authority to enforce Section 396(g)(1)(A) of the Communications Act against the Corporation for Public Broadcasting ("CPB"). Under the Sixth Circuit's "insertion controls" rule, the FCC would have jurisdiction over the CPB, because Congress inserted Section 396 into the Communications Act. Public Telecommunications Financing Act of 1978, Pub. L. No. 95-567, § 301, 92 Stat. 2405 (1978). However, the D.C. Circuit analyzed Congress's intent and

limitation avoids these problems; the Sixth Circuit decision highlights them.

ruled otherwise. The D.C. Circuit noted that another provision, Section 398, instructed that "nothing in the 1962 or 1967 Acts 'shall be deemed . . . to authorize any . . . agency . . . of the United States to exercise any direction, supervision or control over educational television or radio broadcasting, or over the Corporation or any of its grantees or contractors." 521 F.2d at 292 (quoting 47 U.S.C. § 398(b)). The D.C. Circuit further explained that finding FCC jurisdiction over the CPB would constitute a "radical extension of the FCC's basic jurisdictional grant." *Id.* at 293. As the court put it: "no case has ever permitted, and the Commission has never, to our knowledge, asserted jurisdiction over an entity not engaged in "communication by wire or radio," at least absent specific Congressional authorization. *Id.*

This Court should clarify that *AT&T* does not dictate that "insertion into the Act" is a replacement for traditional statutory interpretation tools in assessing the scope of the FCC's jurisdiction. Applying those tools, the Court should make clear that neither Section 201(b) nor any other provision of the Communications Act grants the Commission authority to deem local franchises granted, or to otherwise control the conduct of the franchising process.

III. The Court Should Grant Certiorari To Review the Sixth Circuit's Misapplication of *Chevron*.

Even if the FCC had the power to "carry out the provisions of" Section 621(a)(1) per Section 201(b), it does not follow that under *Chevron USA v. NRDC*, 467 U.S. 837 (1984), the agency may interpret "unreasonably refuse" to deem franchises granted, regulate the local franchising process, or to otherwise adopt the rules it did. To uphold the FCC's regulations, the Sixth Circuit adopted a *per se* rule that turns this Court's *Chevron* teachings on their head: that when Congress explicitly provides for court review, it creates a substantive "gap" that an agency may fill with regulations. The court further compounded the problem by finding FCC rules "reasonable" that are inconsistent with the structure of the Cable Act. These errors justify granting the Petition.

A. The Sixth Circuit Mistakenly Concluded that Section 621(a)(1) Was "Ambiguous."

1. The Sixth Circuit Erred in Concluding That Section 621(a)(1) is Ambiguous Because It Provides for Court Review.

The Sixth Circuit effectively concluded that Congress shifted authority over local franchising from local governments to the FCC and created a gap for the agency to fill when it amended the Cable Act in 1992 to prohibit localities from "unreasonably

refus[ing]" to issue a franchise and to provide for court review of that determination. The Sixth Circuit concluded that amendment was necessarily "vague" because:

> [P]rovision of judicial review as a means to monitor a given LFA's compliance with section 621(a)(1) suggests that it is not instantaneously apparent whether a refusal to grant a prospective franchisee's application is necessarily reasonable or not. The legislative decision to delegate to jurists the task of construing and enforcing section 621(a)(1)'s insistence on reasonableness suggests that the statutory phrase at issue is capable of multiple meanings. To choose between these several meanings, courts will have to engage in fact-finding and uncover the particularities of the case at hand.

Pet. App. 30a. It followed that the term left broad room for agency action.

This *per se* rule represents a fundamental misapplication of *Chevron* that this Court should correct. Under *Chevron*, a court applies traditional statutory tools to determine whether Congress left a gap for an agency to fill – that is, whether a statute leaves an ambiguity that Congress intended the agency to fill through regulation. If after applying traditional interpretative tools, a court "ascertains

that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9 (internal citations omitted).

To determine whether a statute is ambiguous, a court looks to the plain language of the statutory text itself, as well as dictionaries and legislative history where necessary. *See, e.g., Dunn v. CFTC*, 519 U.S. 465, 470 (1997) (consulting legislative history, treatises, and Black's Law Dictionary to interpret statute); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992) (examining legislative history of long-shore statute and employing canons of statutory construction). Moreover, "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). A court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

The court's conclusion that a phrase is "ambiguous" or "vague" within the meaning of *Chevron* merely because Congress provides for case-by-case court review is inconsistent with that approach. *See, e.g., Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990). That courts may come to different legal conclusions based on different facts does not mean the underlying standard for review is ambiguous; it simply means that the outcome may

change based on the facts. Further, manufacturing a "gap" for an agency to fill from a *judicial* review provision seems odd at best. It is especially inappropriate here, where the legislative history of the Cable Act makes it clear that Congress intended for what is "reasonable" or "unreasonable" to vary case-by-case and community-by-community. The Sixth Circuit's view that Congress's decision to assign disputes to the courts under Sections 621(a) and 635(a) serves to *expand* FCC authority so that the FCC may define at the national level what may be included in franchises necessarily frustrates, rather than effectuates, this Congressional intent.

The Sixth Circuit's approach also violates this Court's teaching that it is not appropriate to assume an agency has been granted broad authority where, as here, to do so would create significant constitutional and federalism questions. *See, supra,* Part I.A. As this Court recognized in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), a clear grant of authority to the administrative agency is required where an agency's proposed interpretation of a standard would "result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174. The provision of court review in the Cable Act can by no means be viewed as such a clear grant.

B. <u>In Context, Section 621(a)(1) Is Not Ambiguous and Leaves No Gap for the FCC To Fill</u>.

Had the Sixth Circuit properly analyzed Section 621(a)(1) in light of the principles above, it would have found that the provision leaves no room for FCC "implementation." Section 621(a)(1) sets up a complete process under which a locality makes the determination as to whether a franchise should or should not be granted, with court review available under Section 635. As Congress contemplated, the statute allows for assessment of needs by localities on a case-by-case basis, and an evaluation of the decision in light of local facts, rather than providing for establishment of "one-size-fits-all" franchise terms by the FCC.

Moreover, read in this context, the term "unreasonably refuse" is not ambiguous in any relevant sense. Rather, it defines the standard for court review – a standard similar to standards that the Sixth Circuit has had little trouble applying in other cases. Section 626(c)(1)(D) of the Act permits a locality to deny renewal if it determines that an operator fails to submit a proposal "reasonable to meet the future cable-related needs and interests." In *Union CATV v. City of Sturgis*, 107 F.3d 434, 440-441 (6th Cir. 1997), the Sixth Circuit concluded that what is "reasonable" is determined by balancing competing needs at the local level. This does not lead, as the Sixth Circuit reasoned here, to an *ad hoc* determination of reasonableness by the courts. Pet. App. 30a. Rather, because "[t]he granting of a cable

franchise is a legislative act traditionally entitled to considerable deference . . . [n]othing in the Cable Act suggests that Congress intended to eliminate judicial deference to a municipality's legislative acts." *Union CATV*, 107 F.3d at 441. Which is to say: courts are to review municipal decisions for "reasonableness" or "unreasonableness" in much the same way that they review administrative decisions.

C. <u>Even Assuming the FCC Had Authority To Implement Section 621(a)(1), It Could Not Do So in a Manner Inconsistent with the Act</u>.

The Sixth Circuit also erred at Step Two of *Chevron*. As this Court explained in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002), even where an agency has *some* interpretive authority, and no matter "how serious the problem an administrative agency seeks to address" the agency "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law."

In determining whether an agency action is consistent with a statute's structure, a reviewing court must again apply traditional tools of statutory interpretation. Here, the Sixth Circuit expressly abandoned those tools. Petitioners pointed out, *inter alia,* that where Congress intended to establish deadlines for local action, it expressly established them in the Cable Act. *See, e.g.,* 47 U.S.C. § 537 (120 days to approve transfer request); 47 U.S.C. § 545(b)

(120 days to approve franchise modification). Had the Sixth Circuit applied the traditional interpretive doctrine of "*expressio unius est exclusio alterius*," in light of the Act's general reservation of franchising to localities, it should have concluded that the Congressional silence in Section 621(a)(1) indicated Congress intended to leave the timing of the franchising process to localities. The Sixth Circuit, relying upon a D.C. Circuit case, concluded that the doctrine had no application in an administrative context; and therefore Congress's silence with respect to deadlines in Section 621 meant Congress intended to have the FCC set deadlines. Pet. App. 34a.

The Sixth Circuit's rejection of *expressio unius* conflicts with this Court's application of the doctrine to bar an agency's claim of *Chevron* authority under a statute. *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338-39 (1994). While the doctrine does not always control, *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 79-87 (2002), this Court has not rejected the canon, but instead applies it in the context of the statutory scheme as a whole. In this respect, the Sixth Circuit's decision also conflicts with the D.C. Circuit decision on which it relied. The D.C. Circuit has required a *complete* analysis of the interplay of the two doctrines:

> True, we have rejected the canon in some administrative law cases, but only where the logic of the maxim . . . simply did not hold up in the statutory context.

Indep. Ins. Agents of Am., Inc. v. Hawke, 211 F.3d 638, 644 (D.C. Cir. 2000) (internal citations omitted). The Sixth Circuit's approach cannot be squared with the decisions of this Court, or even the decisions on which it relied.

The problems with the Sixth Circuit's decision extend beyond the failure to take the *expressio unius* doctrine into account. It is implausible that in a statute that carefully divided authority among levels of government, Congress buried within the phrase "unreasonably refuse" the power for the FCC to radically transform the local franchising process. In those two words, the FCC unearths the following powers over local governments and their property:

- The FCC assumes the power to deem a local franchise granted, in direct conflict with the Cable Act's careful definitions of who is a "franchising authority," and who may issue "franchises."

- The FCC establishes deadlines for local action, and preempts public hearing and other processes to the extent these processes would prevent a locality from meeting the Commission's deadlines. Pet. App. 141a, ¶ 67; *id.* 150a, ¶ 73. The local processes the FCC preempted are significant means by which a local or state legislature gains the "understanding of local communications needs" that allows it to tailor requirements to

local needs. H.R. Rep. No. 98-934, at 24, 1984 U.S.C.C.A.N. at 4661. A rule that limits local ability to determine needs is inconsistent with an Act that is focused on local needs.

- The FCC rules that a local community cannot establish requirements for public, educational and government access that are more burdensome than those imposed on the incumbent. Pet. App. 191a, ¶ 114. But franchise agreements are issued for long terms. To "tailor" requirements to "needs and interests," the Cable Act plainly intends that localities will look *forward* to assess what is "adequate" in the future. However, the FCC compels localities to look backward, effectively locking in the assessment of PEG "needs" embodied in a dated franchise agreement.

- Although the Act permits localities to recover costs "incidental to" the awarding and enforcing of a franchise in addition to collecting a franchise fee, 47 U.S.C. § 542(g)(2)(D), the FCC rules that consultant and attorney costs need not be incurred by a local authority in connection with the grant of a local franchise, and so are not "incidental" costs within the meaning of the Cable Act. Pet. App. 176a, ¶ 99. The Act specifically contemplates that localities may need to conduct expert studies as part of the franchising process, H.R. Rep. No. 98-934,

1984 U.S.C.C.A.N. at 4711-12 (surveys may be important in establishing community needs), and it is disingenuous to suggest that legal help is not needed to review and comply with an FCC Order that is more than 100 pages long. The FCC effectively requires localities to use franchise fees to defray regulatory costs, which it may not do under 47 U.S.C. § 542(h).[8]

These inconsistencies justify granting the Petition. There is, in addition, a broader inconsistency that pervades the Order and that requires this Court's review. As shown in the Statement of the Case, the FCC's decisions were bluntly driven by its dissatisfaction with the delays it believed were inherently caused by a franchising process rooted in "reasonable" *local* decisions.[9] But that *is* the process Congress adopted. By replacing Congress's choice with a list of substantive *federal* rules, the FCC has not permissibly implemented the words "unreasonably refuse," because Congress intended reasonableness of franchise requirements to be assessed on a case-by-case basis, through a local process. In a similar case, where the Secretary of Labor had the power to adopt regulations

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[8] The FCC's analysis of "incidental to" also suffers from a *Chevron* Step One problem – it is inconsistent with the plain language of the Act. The FCC found that a list of examples of "incidental" costs was effectively exhaustive, and that the term "incidental" means "small" as opposed to "in connection with." Only the latter makes linguistic sense.

[9] *See* Part IV, *infra*.

"necessary to carry out" an Act, 29 U.S.C. § 2654, the Court rejected a remedy that the Secretary believed would be superior to a "fact-specific inquiry." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002). The Court explained that the Secretary could not, indirectly by regulation, resolve issues that Congress had directly left for the courts to resolve on a case-by-case basis:

> By its nature, the remedy created by Congress requires the retrospective, case-by-case examination the Secretary now seeks to eliminate. . . . Though the Secretary could not enact rules purporting to make these kinds of determinations for the courts, [its rule] has this precise effect.[10]

Id. (internal citations omitted). The rules here are equally objectionable.

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[10] Prior to 1992, Section 635, 47 U.S.C. § 555, specified the remedy available to operators where an LFA denied a request for modification or renewal: it provided for case-by-case court review. The 1992 amendments that are the subject of this Petition expanded this remedy so that a cable operator whose request for an initial franchise was denied could also obtain court review. Reading the 1992 amendments to grant the FCC powers to grant franchises and establish franchise terms is inconsistent with this pre-existing remedial scheme, and cannot be squared with *Ragsdale*.

IV. Certiorari is Appropriate In Light of the Sixth Circuit's Failure To Conduct the Analysis Required By *Universal Camera.*

The Order makes clear that the decision to impose rules on local governments was dependent upon agency's finding that local governments were abusing the franchising process and delaying competitive entry. Pet. App. 60a, ¶ 4. However, the Sixth Circuit failed to conduct the analysis required by this Court's precedents to determine whether that conclusion was supported by the record.

Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951), requires a court reviewing the substantiality of the evidence before the agency to "take into account whatever in the record fairly detracts from its weight." This standard was embodied statutorily in the Administrative Procedure Act to prevent agencies from adopting rules by pointing to evidence that supported the desired conclusion, while ignoring that which undercut it. *Id.* at 478 (irresponsible weighing of evidence was thought to create "serious menace").

There was reason to carefully review the record in this case. Dissenting Commissioner Adelstein noted that "the majority simply accepts in every case that the phone companies are right and the local governments are wrong, all without bothering to examine the facts behind these competing claims, or conducting any independent fact-finding." Pet. App. 298a.

The Sixth Circuit nonetheless upheld the FCCs finding because it concluded that there was evidence *supporting the agency's finding*. Pet. App. 51a. This is the test *Universal Camera* rejected. Had the court of appeals conducted the necessary analysis, it would have discovered that the FCC failed to weigh evidence contrary to its conclusions, just as Commissioner Adelstein suggested. Particularly given the impact of the FCC rules on the local franchising process and franchising officials, it is appropriate for this Court to grant certiorari, and to require that the record be analyzed under the proper standard.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 10, 2009

APPENDIX

APPENDIX A
Opinion of the United States Court of Appeals for the Sixth Circuit (June 27, 2008)

Nos. 07-3391/3569/ 3570/ 3571/ 3572/3573/ 3574/3673/ 3674/3675/ 3676/3677/ 3824

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Alliance for Community Media, et al.,
Petitioners,

State of Hawaii; City and County of San Francisco; National Cable & Telecommunications Association, Inc.; City of New York; City of Milwaukee, Wisconsin; City of White Plains, New York; City of Wilmington, Delaware,
Intervenors,

v.

Federal Communications Commission; United States of America,
Respondents,

Ad Hoc Telecom Manufacturer Coalition; Qwest Communications International, Inc.; USTelecom; Verizon; AT&T,
Intervenors.

On Petition for Review of an Order of the Federal Communications Commission.
No. 05-311.

Argued: February 6, 2008

Decided and Filed: June 27, 2008

Before: SUHRHEINRICH, COLE, and GIBBONS, Circuit Judges.

OPINION

R. GUY COLE, JR., Circuit Judge. Following a notice-and-comment rulemaking procedure, the Federal Communications Commission ("FCC," "Commission," or "the agency") released an order ("the Order") adopting rules interpreting and implementing section 621 (a)(1) of the Communications Act of 1934 ("the Act"), 47 U.S.C. § 541(a)(1), which prohibits local franchising authorities from "unreasonably refus[ing] to award" competitive cable franchises. The FCC released the Order on March 5, 2007 on the basis of record evidence that the operation of the local franchising process was unreasonably impeding competitive entry into the cable television market. A summary of the Order was subsequently published in the *Federal Register* on March 21, 2007.

Petitioners and intervenors, consisting primarily of various local franchising authorities ("LFAs"), their representative organizations, and the

incumbent cable industry's trade association, request us to reverse the FCC's decision and declare the Order void in its entirety, asserting that the FCC lacks the requisite authority to promulgate the Order and, in the alternative, that the FCC's interpretation is not entitled to deference and is arbitrary and capricious. For the following reasons, we find that the FCC acted well within its statutorily delineated authority in enacting the Order and that there exists sufficient record evidence to indicate that the FCC did not engage in arbitrary-and-capricious rulemaking activity. Accordingly, we **DENY** the petitions for review.

I. BACKGROUND

A. Factual Background

Given the complexity of the regulatory regime at issue, we begin by tracing the historical evolution of cable regulation and the role of the FCC therein. The public at large first obtained access to cable television in the 1950s. *See generally City of Dallas, Tex. v. FCC*, 165 F.3d 341, 345-46 (5th Cir. 1999). During this first decade in which cable television was publicly available, the FCC abstained from regulating in this arena because it believed it lacked the authority to do so under existing statutory provisions. *Id.* at 345. By the mid-1960s, however, cable television had proliferated to such a degree that the FCC determined that it must regulate cable franchises in order to carry out its statutory duty to oversee all forms of broadcasting on behalf of the

public interest. *Id.* The Supreme Court subsequently affirmed the FCC's regulatory authority over cable television, holding that the agency was authorized to issue rules that were "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

Regulation of cable services did not fall entirely on the shoulders of the FCC, however. Municipalities, or LFAs, also exerted an interest in regulating the cable medium. *See generally American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1558 (D.C. Cir. 1987). Specifically, they retained discretion to decide whether to grant cable franchises to applicants in their communities. Id. at 1558. As part of this negotiation process, cable operators frequently agreed to perform various activities on behalf of the public interest in exchange for a franchise. *Id.*

Given the overlapping jurisdiction of the FCC and the municipalities, in 1972 the agency issued a report to delineate the contours of its jurisdiction vis-a-vis the LFAs. Cable Television Report and Order, 36 F.C.C. 2d 143, on reconsideration, 36 F.C.C. 2d 326 (1972), aff'd sub. nom. *American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975). In this report, the agency carved out a system of "deliberately structured dualism." *Id.* Within this binary regulatory regime, "state or local government issued franchises while the FCC exercised exclusive authority over all operational aspects of cable

communication, including technical standards and signal carriage." *National Cable Television Ass'n v. FCC*, 33 F.3d 66, 68-69 (D.C. Cir. 1994) (internal quotations omitted).

This was the state of the cable communications market until 1984. At this time, approximately twenty years following the FCC's foray into the cable television market, Congress conveyed its input for the first time through passage of a legislative amendment to the Communications Act[1], entitled the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779. The 1984 Act was a response to the "illdefined [sic] ... state of regulatory uncertainty" resulting from the overlapping authority of the FCC and municipalities. *American Civil Liberties Union*, 823 F.2d at 1559. Accordingly, the legislation enlarged the Communications Act by inserting Title VI provisions governing the operation of cable providers and franchises. The purpose of these provisions was to "establish[] a national policy that clarifie[d] the current system of local, state and federal regulation of cable television" and to "continue[] reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the

[1]"The Communications Act of 1934, Pub. L. No.73-416, 48 Stat. 1064 . . . . grants the FCC broad authority to regulate all aspects of interstate communication by wire or radio." *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1557-58 (D.C. Cir. 1987).

franchise process." H.R. Rep. No. 98-934 at 24. Thus, the regulatory guidelines incorporated into Title VI aimed to "both . . . reliev[e] the cable industry from unnecessary, burdensome regulation and . . . ensur[e] that cable systems remain responsive to the needs of the public." *American Civil Liberties Union*, 823 F.2d at 1559. In so doing, the amendments "balance[d] two conflicting goals: preserv[ing] the critical role of municipal governments in the franchise process ... while affirming the FCC's exclusive jurisdiction over cable service, and overall facilities which relate to such service." *City of New York v. FCC*, 814 F.2d 720, 723 (D.C. Cir. 1987) (internal quotations and citations omitted).

As a result of the amendment, when an entity now chooses to enter the market and offer services as a "cable operator,"[2] it must comply with the dictates of Title VI. Section 621 of Title VI—the provision at issue in the instant case—enumerates various requirements cable operators must follow to acquire cable franchises. Specifically, subsection (b)(1) of Section 621, 47 U.S.C. § 541(b)(1), situates the securing of cable franchises as a mandatory

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[2]47 U.S.C. § 542(5) (defining "cable operator" as "any person or group of persons (A) who provides cable services over a cable system and directly or through one or more affiliates owns a significant interest in a cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.")

precondition for providing cable services,[3] and subsection (a)(1), 47 U.S.C. § 541(a)(1), authorizes LFAs to award these franchises.[4] By delegating this task to LFAs, the 1984 Act effectively "preserve[d] the role of municipalities in cable regulation." *City of Dallas, Tex.*, 165 F.3d at 345.

Subsequently, in 1992, Congress once again weighed in on the regulation of cable television and clarified the role of LFAs through enactment of the Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460. Specifically, Congress revised section 621(a)(1) to codify restraints on the licensing activities of an LFA such that it may grant "1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and *may not unreasonably refuse to award an additional competitive franchise.*" (emphasis added). Through this amendment, Congress further endowed potential entrants with a judicial remedy by entitling them to commence an action in a federal or state court within 120 days after receiving a final, adverse

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[3]47 U.S.C. § 541(b)(1) ("Except to the extent provided in paragraph (2) and subsection (f), a cable operator may not provide cable service without a franchise.")

[4]47 U.S.C. § 541(a)(1) (stating that a "franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction.") A "franchising authority" is defined to encompass "any governmental entity empowered by Federal, State, or local law to grant a franchise." Section 602(10) of the Communications Act, 47 U.S.C. § 522(10).

decision from an LFA.[5] It is the legitimacy and precise import of these restraints that give rise to the instant controversy.

According to the legislative history, Congress enacted this amendment in part because the local franchising requirements provided most cable subscribers with "no opportunity to select between competing cable systems." H.R. Conf. Rep. No. 102-862, at 55 (1992). Therefore, the purpose of these constraints was to foster heightened competition in the cable market:

> Based on the evidence in the record taken as a whole, it is clear that there are benefits from competition between two cable systems. Thus, the Committee believes that local franchising authorities should be encouraged to award second franchises. Accordingly, [the 1992 Cable Act,] as reported, prohibits local franchising authorities from unreasonably refusing to grant second franchises.
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> S. Rep. No. 102-92, at 13 (1991).

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[5]"Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section [635 of the Act] for failure to comply with this subsection." 47 U.S.C. § 541(a)(1).

Overall then, the legislators adopted a revised version of section 621(a)(1) because they "believe[d] that exclusive franchises are directly contrary to federal policy . . . which is intended to promote the development of competition." H.R. Conf. Rep. No. 102-862, at 77 (1992).

B. Procedural Background

Over a decade following the passage of the 1992 amendments to the Communications Act, the FCC compiled data suggesting that competition had yet to materialize as a reality for the cable market. S. Rep. No. 102-92. To investigate the state of the cable market, on November 3, 2005, the FCC adopted a Notice of Proposed Rulemaking ("NPRM") and subsequently released it on November 18, 2005. In the NPRM, the FCC invited comment on approaches to implementing Section 621(a)(1) of the Communications Act of 1934. Responding to charges from potential entrants into the cable marketplace that "the current operation of the local franchising process serves as a barrier to entry[,]" the FCC solicited comment on "whether the franchising process unreasonably impedes the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment and, if so, how the Commission should act to address that problem." Specifically, in issuing the NPRM, the FCC sought to determine whether LFAs "are carrying out legitimate policy objectives allowed by the [Communications] Act or are hindering the federal communications policy objectives of increased

competition in the delivery of video programming and accelerated broadband deployment."

The FCC further called for comment on formulating a definition of "what constitutes an unreasonable refusal to award an additional competitive franchise under Section 621(a)(1)." In making initial headway toward a definition, the FCC tentatively concluded in the NPRM that "Section 621(a)(1) prohibits not only the ultimate refusal to award a competitive franchise, but also the establishment of procedures and other requirements that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise." (JA 475.) In addition to soliciting comments on the ease of entry into the cable market, the FCC also tentatively concluded that it possesses legitimate authority to implement Section 621(a)(1) "to ensure that the local franchising process does not unreasonably interfere with the ability of any potential new entrant to provide video programming to consumers." (JA 474.)

After reviewing the "voluminous record" generated by the rulemaking proceeding, consisting of "comments filed by new entrants, incumbent cable operators, LFAs, consumer groups, and others[,]" the FCC ascertained the need for new rules to ensure that the local franchising process operated in a fully competitive fashion, free of barriers to entry. (JA 500.) Accordingly, on December 20, 2006, by a vote of three to two, the FCC adopted the Order at issue. The Order was released on March 5, 2007 and became

final on March 21, 2007, when it was published in the *Federal Register*. (JA 491-599; 72 Fed. Reg. 13230 (2007).) Attached to the Order was the dissenting opinion of Commissioner Jonathan S. Adelstein. The thrust of Commissioner Adelstein's dissent was that the Order "substitutes [the FCC's] judgment as to what is reasonable–or unreasonable–for that of local officials–all in violation of the franchising framework established in the Communications Act." (JA 586.)

Notwithstanding Commissioner Adelstein's dissent, as a threshold matter, the Order first established the FCC's "broad rulemaking authority to implement the provisions of the Communications Act, including Title VI generally and Section 621(a)(1) in particular." (JA 493.) The FCC derived support for its rulemaking authority from various statutory provisions, including 47 U.S.C. § 303(r), which empowers the agency to implement "such rules and regulations . . ., not inconsistent with law, as may be necessary to carry out the provisions of th[e] [Communications] Act[,]" 47 U.S.C. § 201(b), which authorizes the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act[,]" and 47 U.S.C. § 4(i), which states that the FCC "may perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions." (JA 518.) The agency also justified its actions on the basis that "Congress specifically charged [it] with the administration of the Cable Act, including Section

621" and that "federal courts have consistently upheld . . . [its] authority in this area." (*Id.*)

In response to comments from incumbent cable operators that the judicial review provisions of sections 621(a)(1) and 635 of the Communications Act invested the federal courts with exclusive jurisdiction to interpret and enforce section 621(a)(1), the FCC explained that the availability of judicial review did not in any way attenuate its rulemaking authority. (JA 518-19.) The agency insisted that the "mere existence of a judicial review provision in the Communications Act does not, by itself, strip the Commission of its otherwise undeniable rulemaking authority." (JA 519.) "As a general matter," the FCC continued, "the fact that Congress provides a mechanism for judicial review to remedy a violation of a statutory provision does not deprive an agency of the authority to issue rules interpreting the statutory provision." (*Id.*)

Upon establishing its broad rulemaking authority, the FCC then proceeded to address the merits of the most pressing problems it identified in the cable franchising process. Based on the factual record before it, the FCC found that "the current operation of the franchising process can constitute an unreasonable barrier to entry for potential cable competitors, and thus justifies Commission action." (JA 500.) The agency opined that "absent Commission action, deployment of competitive video services by new cable entrants will continue to be unreasonably delayed or, at worst, derailed." (*Id.*)

To avoid such ends and to further the goals of reducing barriers to entry into the cable market and facilitating investment in broadband facilities, the Order codified five rules construing the meaning of "unreasonable" within section 621(a)(1). First, the FCC ruled that "an LFA's failure to issue a decision on a competitive application within the time frames specified herein constitutes an unreasonable refusal to award a competitive franchise." (JA 493.) The FCC accordingly delineated two applicable time frames: ninety days for applicants, such as telephone companies, with already existing authorizations for access to rights-of-way, and six months for all other competitive franchise applicants. As a means of enforcement, the FCC declared that if an LFA failed to issue a final decision within the requisite time frame, the applicant's proposal would be deemed granted on an interim basis until the LFA delivered a final decision.

Second, the FCC ruled that "an LFA's refusal to grant a competitive franchise because of an applicant's unwillingness to agree to unreasonable build-out mandates[6] constitutes an unreasonable

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[6]Build-out requirements necessitate that a franchisee deploy cable services to all households in a given franchise area within a specified duration. The principal statutory limitation on the right of LFAs to impose build-out requirements is that they allow the applicant a reasonable time period to do so. 47 U.S.C. § 541(a)(4)(A). The build-out provisions are intended to meet community needs and facilitate one of the goals of the Communications Act, that "cable service is not denied to any group of potential residential cable subscribers because of the

refusal to award a competitive franchise." (JA 493.) While the agency characterized build-out requirements as "eminently sensible" under the prior regime, in which incumbent cable providers were granted community-wide monopolies, under the current, competitive regime, these requirements "make entry so expensive that the prospective . . . provider withdraws its application and simply declines to serve any portion of the community." (JA 532-33.) Given the entry-deterring effects of build-out requirements, the agency exercised its rulemaking authority to proscribe LFAs from conditioning franchises on these requirements.

Third, the Order included a ruling regarding franchise fees. The FCC declared that "unless certain specified costs, fees, and other compensation required by LFAs are counted toward the statutory [five] percent cap on franchise fees, demanding them could result in an unreasonable refusal to award a competitive franchise." (JA 493.) The Order went on to explain that "a cable operator is not required to pay franchise fees on revenues from non-cable services." (JA 536.) Similarly, the FCC mandated that "any requests made by LFAs that are unrelated to the provision of cable services by a new competitive entrant are subject to the statutory [five] percent franchise fee cap." (JA 539.)

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income of the residents of the local area in which such group resides," *see id.*, a practice commonly known as "redlining."

Fourth, the FCC ruled that while LFAs may seek assurances from prospective cable operators that they will provide public, educational, and governmental ("PEG") access channel capacity, "LFAs may not make unreasonable demands of competitive applicants for PEG." (JA 541.) As an example of such an unreasonable demand, the FCC stated that it would be "unreasonable for an LFA to impose on a new entrant more burdensome PEG carriage obligations than it has imposed upon the incumbent cable operator." (JA 543.) In contrast, the agency approved a "*pro rata* cost sharing approach" in which a "new entrant agrees to share *pro rata* costs with the incumbent operator" as "*per se* reasonable." (JA 544.)

Lastly, the FCC clarified that "the LFA's jurisdiction applies only to the provision of cable services over cable systems." (JA 545.) Based on this limited jurisdiction, the Order characterizes as "unreasonable" an LFA's refusal to issue a franchise based on issues related to non-cable services or facilities. (*Id.*) For example, the FCC explained that an "LFA may not use its video franchising authority to attempt to regulate a [local exchange carrier's] entire network beyond the provision of cable services." (*Id.*)

Beyond codifying these five rules, the FCC's Order also "preempt[ed] local laws, regulations, practices, and requirements to the extent that: (1) provisions in those laws, regulations, practices, and agreements conflict with the rules or guidance adopted in this *Order*; and (2) such provisions are not

specifically authorized by state law." (JA 546.) Despite its preemption of local laws and regulations, however, the Order declined to preempt state laws, state-level franchising decisions, or local franchising decisions "specifically authorized by state law." (*Id.*) The FCC refrained from preemption of state regulations because it lacked "a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises." (*Id.*)

In conjunction with the Order, the FCC issued a Further Notice of Proposed Rulemaking. This Notice underscored that since the Order implemented section 621(a)(1), its immediate applicability was only to applicants seeking "*additional* competitive franchises," not to existing franchisees. (JA 535, 554). Accordingly, the FCC initiated a second round of rulemaking, "seeking comment on how [its] findings in [its] Order should affect existing franchisees" and "on local consumer protection and customer service standards as applied to new entrants." (JA 494, 554-58.)

Following publication of the Order, on April 3, 2007, the Alliance for Community Media ("ACM"), the National Association of Counties ("NAC"), the National Association of Telecommunications Officers and Advisors ("NATOA"), the National League of Cities ("NLC"), the United States Conference of Mayors ("USCM"), and Alliance for Communications

Democracy ("ACD")[7] (collectively, "petitioners") timely filed petitions for review of the Order in courts of proper venue under 28 U.S.C. § 2343. ACM's petition for review typifies the claims of petitioners in challenging the Order "on the grounds that it exceeds the FCC's statutory authority, is arbitrary and capricious, an abuse of discretion, unsupported by substantial evidence, in violation of the United States Constitution . . . and is otherwise contrary to law." (JA 600-01.) On April 10, 2007, the Judicial Panel on Multidistrict Litigation exercised its authority under 28 U.S.C. § 2112(a) to consolidate the petitions for review of the Order and randomly designated this Court to hear the matter. Petitioners thereafter requested this Court to stay the Order's applicability pending judicial review, but this Court denied that request on July 24, 2007.

II. DISCUSSION

A. The FCC's Authority to Issue the Order

At the outset, petitioners contest the FCC's underlying authority to promulgate rules implementing section 621(a)(1) of the Communications Act. Petitioners maintain that the FCC exceeded the bounds of its authority when it adopted the Order because Congress never explicitly

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[7]ACM, NAC, and NATOA filed petitions for review on April 3, 2007 with the United States Courts of Appeals for the Sixth, Third, and Fourth Circuits, respectively. ACD, USCM, and NLC filed petitions for review on May 17, 2007 with the United States Court of Appeals for the D.C. Circuit.

or implicitly delegated power to the FCC to interpret section 621(a)(1). In contrast, the FCC insists that it undoubtedly possesses the requisite authority to implement the Order and that petitioners' argument "rest[s] on a fundamental misunderstanding of the statutory scheme." (Respondent's Br. 21.)

In support of its jurisdictional argument, petitioners emphasize that nowhere in the plain language of section 621(a)(1) does any reference to the Commission appear. Turning to the text, section 621(a)(1) reads as follows:

> (a) Authority to award franchises; public rights-of-way and easements; equal access to service; time for provision of service; assurances
>
> > (1) A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not *unreasonably refuse to award an additional competitive franchise.* Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of

> section 555 of this title for failure
> to comply with this subsection.

47 U.S.C. § 541(a)(1) (emphasis added).

Petitioners are thus correct in noting that, while the text expressly references franchising authorities, it is silent as to the agency's role in the process of awarding cable franchises. Where petitioners' argument falls short, however, is in equating the omission of the agency from section 621(a)(1) with an absence of rulemaking authority.

In *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), the Supreme Court considered a challenge by state utility commissions and local exchange carriers to local competition rules issued by the FCC pursuant to the Telecommunications Act of 1996. In considering whether the FCC possessed the regulatory authority to interpret the provisions of the Telecommunications Act of 1996 at issue, the Court hinged its analysis on section 201(b), a 1938 amendment to the Communications Act of 1934. *AT&T Corp.*, 525 U.S. at 377. Section 201(b) provides, in relevant part, that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). The Court reasoned that "[s]ince Congress expressly directed that the 1996 Act, along with its local-competition provisions, be inserted into the Communications Act of 1934 . . . the Commission's rulemaking authority would seem to extend to implementation of the local competition

provisions." *AT&T Corp.*, 525 U.S. at 377-78. In other words, *AT&T Corp.* espoused a plain reading of section 201(b): "We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996." *Id.* at 378.

We find that the logic of *AT&T Corp.* controls the disposition of the jurisdictional argument petitioners raise here. Just as Congress ratified the Telecommunications Act of 1996 as an amendment to be incorporated into the original Communications Act of 1934, Congress likewise passed the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, which revised section 621(a)(1) to include the bar on unreasonable refusals to award additional franchises, as an amendment to the original Communications Act of 1934. Through this process of amendment, Congress incorporated section 621(a)(1) into the Communications Act of 1934, and the statutory language at issue here thus qualifies as a "provision[] of this Act" within the meaning of section 201(b). Thus, because "the grant in § 201(b) means what it says[,]" we are bound by this plain meaning and thereby conclude that, pursuant to section 201(b), the FCC possesses clear jurisdictional authority to formulate rules and regulations interpreting the contours of section 621(a)(1). *See AT&T Corp.*, 525 U.S. at 378.

Locating jurisdictional support for the FCC's rulemaking in section 201(b) further explains the absence of any reference to the Commission in the language of section 621(a)(1). Facing a similar argument regarding statutory silence with respect to an agency's rulemaking authority, the Supreme Court underscored that there is an "obvious difference between a statutory *requirement* . . . and a statutory *authorization*." *Alaska Dept. of Environmental Conservation v. E.P.A.*, 540 U. S. 461, 491 (2004) (emphasis in original). In the specific context of the Communications Act, the Court has observed that it is "not peculiar that the [congressionally] mandated regulations should be specifically referenced, whereas regulations permitted pursuant to the Commission's § 201(b) authority are not." *AT&T Corp.*, 525 U.S. at 385. Standing alone then, the statutory silence in section 621(a)(1) regarding the agency's rulemaking power does not divest the agency of its express authority to prescribe rules interpreting that provision.

Cases from our sister circuits interpreting section 621 lend further support to our finding of the agency's jurisdiction here. In *City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 1999), for example, the Seventh Circuit squarely addressed the issue of whether the "FCC was . . . granted regulatory authority over 47 U.S.C. § 541, the statute setting out general franchise requirements." In answering this question, the court explained that "the FCC is charged by Congress with administration of the Cable Act . . . We are not convinced that for some reason the FCC has well-accepted authority under the Act but

lacks authority to interpret § 541 and to determine what systems are exempt from franchising requirements." *City of Chicago*, 199 F.3d at 428 (internal citations omitted).

Likewise, in *National Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994), the D.C. Circuit confronted the question of whether the FCC's interpretation of the franchise requirements set forth in section 621(b)(1) was a reasonable construction of the statute. Although not addressing the jurisdictional question directly, the court concluded that the regulations at issue represented reasonable constructions of section 621(b)(1) and therefore denied the petitions for review. *Id.* at 75. Implicit in the court's deference to the FCC's interpretations was an acknowledgment that the agency possessed the underlying regulatory authority to promulgate rules construing section 621. Thus, our jurisdictional holding today reinforces the conclusions of our sister circuits.

As a final jurisdictional challenge, petitioners focus their argument on the availability of judicial review under section 621(a)(1). Immediately after assigning LFAs the task of awarding franchises, the next sentence of section 621(a)(1), by cross-referencing section 635 of Title VI, identifies the courts as the forum for aggrieved cable operators to obtain relief. *See* 47 U.S.C. § 555(a)(1),(2) ("Any cable operator adversely affected by any final determination made by a franchising authority under section 541(a)(1) . . . of this title may

commence an action within 120 days after receiving notice of such determination, which may be brought in (1) the district court of the United States for any judicial district in which the cable system is located; or (2) in any state court of general jurisdiction having jurisdiction over the parties."). In light of this judicial review provision, petitioners challenge the Order for "ignor[ing] this basic statutory structure . . . [by] in effect, add[ing] a third clause to Section 635(a) that would allow local franchising matters under Section 621(a)(1) to be ruled upon by the FCC." (Petitioner ACM's Br. 18; *see also* Petitioner NCTA's Br. 24-26; Petitioner Tampa's Br. 16-17; Petitioner New Jersey's Br. 16-17.) Petitioners contend that the FCC's intervention in franchising decisions violates Congressional intent that the courts serve as the only other body with concurrent jurisdiction over section 621(a)(1). By issuing the Order, their argument goes, the FCC has impermissibly encroached on the exclusive role of the courts in providing redress to aggrieved cable operators.

In effect, petitioners' argument calls upon us to determine whether the judicial review provisions in the second part of section 621(a)(1) are exclusive and thereby override the FCC's exertion of rulemaking authority. Our inquiry leads us to a negative answer: the availability of a judicial remedy for unreasonable denials of competitive franchise applications does not foreclose the agency's rulemaking authority over section 621(a)(1). While the Order equips LFAs with guidance on reasonable versus unreasonable distribution of

franchises, the courts ultimately retain their Congressionally-granted jurisdiction to hear appeals involving denials of competitive franchises. Although the courts may have to grant deference to the Order, this does not in any way impede the courts' fact-finding or legal analysis during actual judicial proceedings.

Our conclusion today that the FCC possesses jurisdiction over section 621 (a)(1) coextensive with that of the courts is buttressed by the Supreme Court's analogous decisions in *AT&T Corp.* and *U.S. v. Haggar Apparel Co.*, 526 U.S. 380 (1999). In the former case, although the Communications Act specifically provides for judicial review of state commission decisions arbitrating interconnection disputes among telephone companies, 47 U.S.C. § 252(e)(6), the Supreme Court upheld the FCC's authority to issue rules governing the states' resolution of such disputes. *AT&T Corp.*, 525 U.S. at 377-85. The Court reasoned that Congress's "assignment[]" of the adjudicatory task to state commissions did not "logically preclude the [FCC]'s issuance of rules to guide the state-commission judgments." *Id.* at 385.

Likewise, in *Haggar Apparel*, a manufacturer of imported clothing brought an action to challenge regulations issued by the United States Customs Service through the notice-and-comment rulemaking process. 526 U.S. at 380. Specifically, the company contested the applicable scope of the rules, arguing that they applied only to customs officers and not to

the Court of International Trade in importers' refund suits. *Id.* at 386-87. The Court, however, rejected Haggar Apparel's attempt to release the Court of International Trade from adherence to the rules and ultimately held that "[d]eference can be given to the regulations without impairing the authority of the [Court of International Trade] to make factual determinations, and to apply those determinations to the law, *de novo*." *Id.* at 391. Similarly, in the instant case, we believe that courts can grant deference to the Order while maintaining their Congressionally-granted authority to make factual determinations and provide relief to aggrieved cable operators.

B. *Chevron* Analysis

Because we find that the agency possesses the underlying authority to issue the Order, our subsequent task is to ascertain whether the contents of the Order merit our deference pursuant to *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In *Chevron*, the Supreme Court observed that, pursuant to the principle of deference to administrative interpretations, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." 467 U.S. at 844. To determine whether such deference is warranted, the *Chevron* analysis, colloquially referred to as the "*Chevron* two-step," requires the following inquiry: "the court [must] ask 'whether the statute is silent or ambiguous with respect to the specific issue before it; if so, the

question for the court [is] whether the agency's answer is based on a permissible construction of the statute." *Singh v. Gonzales*, 451 F.3d 400, 403-04 (6th Cir. 2006) (citation and quotation marks omitted). Within this analytical framework, judicial deference to an agency's construction of a statute is justified because the "statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). The Supreme Court has explained that "a very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the process of rulemaking . . . that produces regulations or rulings for which deference is claimed." *United States v. Mead Corporation*, 533 U.S. 218, 229 (2001).

Applying the dictates of *Chevron*, we find that the Order is entitled to our deference. At the outset, we note that, as reflected by the NPRM, the sixty-day comment period, and the ninety-day reply comment period, the FCC promulgated the Order through the formal channels of notice-and-comment rulemaking pursuant to section 553 of the APA. According to the Supreme Court's pronouncement in *Mead*, the FCC's conformance with notice-and-comment procedures serves as a "very good indicator of delegation meriting Chevron treatment." 533 U.S. at 229; *see also, Estate of Gerson v. C.I.R.*, 507 F.3d 435, 438 (6th Cir. 2007) (finding that a Treasury Regulation adopted by the IRS deserved deference because "the IRS regularly engages in notice and comment

procedures for its general-authority regulations; these procedures foster fairness and deliberation."); *Cleveland Nat. Air Show, Inc. v. U.S. Dept. of Transp.*, 430 F.3d 757, 763 (6th Cir. 2005) (noting that a "formal process is one signal that an agency deserves *Chevron* deference.").

Turning to the *Chevron* two-step analysis, we are of the view that the language at issue in section 621(a)(1) is indeed ambiguous, and that the FCC's construal of the language in the Order amounts to a permissible construction of this language.

1. *Chevron Step 1: Statutory Ambiguity*

The initial question under step one of the *Chevron* framework is "whether Congress has directly spoken to the precise question at issue" by employing precise, unambiguous statutory language. *Chevron*, 467 U.S. at 842. This first step is informed by the recognition that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843, n.9. When conducting the inquiry required by *Chevron's* first step, "our primary goal is to effectuate legislative intent using traditional tools of statutory interpretation." *Estate of Gerson*, 507 F.3d at 439. In harnessing these tools, we must construe statutory language "in pertinent context rather than in isolation." *Id.*

In the case at bar, the statutory phrase within section 621(a)(1) which emerges as a candidate for ambiguity is "*unreasonably* refuse to award an additional competitive franchise." 47 U.S.C. § 541(a)(1) (emphasis added). Language is ambiguous when "to give th[e] phrase meaning requires a specific factual scenario that can give rise to two or more different meanings of the phrase." *Beck v. City of Cleveland, Ohio*, 390 F.3d 912, 920 (6th Cir. 2004).

While we have not previously interpreted the phrase "unreasonably" under section 621(a)(1), in the context of other provisions of the Communications Act, courts called upon to ascertain the ambiguity of descriptors such as "reasonable" and "unreasonable" have found these words subject to multiple constructions. In *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003), *cert. denied*, 542 U.S. 937 (2004), for example, the petitioner filed a petition for review of an FCC adjudication which found that Verizon's practice of granting sales concessions to certain prospective customers did not rise to "unjust or unreasonable" discrimination in violation of 47 U.S.C. § 202(a). In conducting the requisite *Chevron* analysis, that court stated that "the generality of these terms–unjust, unreasonable–opens a rather large area for the free play of agency discretion, limited of course by familiar arbitrary and capricious standard in the Administrative Procedure Act." *Orloff*, 352 F.3d at 420 (internal quotations omitted).

Similarly, confronting section 201(b) of the Communications Act, which mandates that any

interstate communications charge be "just and reasonable" and characterizes as unlawful any communications charge that is "unjust or unreasonable," the panel majority explained that "[b]ecause 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them." *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994).

Of course, the detection of inherent ambiguity in words such as "reasonable" and "unreasonable" by other courts in other sections of the Communications Act does not terminate the analysis here, because such observations are divorced from the specific context of Title VI. *See Bower v. Federal Exp. Corp.*, 96 F.3d 200, 208-09 (6th Cir. 1996) ("[E]ven facially ambiguous provisions can have their meanings clarified and rendered unambiguous by reference to the statute's structure or to other unambiguous terms in the statute."). As petitioners argue, while "unreasonable" may generally engender ambiguity and multiplicity of meaning, it is not inconceivable that its particular usage within section 621(a)(1) is perfectly clear. Thus, we must probe the structure and history surrounding the enactment of section 621(a)(1) to establish whether the use of "unreasonable" in this case fosters ambiguity.

Immediately following section 621(a)(1)'s limitation on unreasonable refusals to award additional franchises, the provision cross-references

section 635 and thereby charges the courts with the task of determining whether there has been a "failure to comply with this subsection." 47 U.S.C. § 541(a)(1). Congress's provision of judicial review as a means to monitor a given LFA's compliance with section 621(a)(1) suggests that it is not instantaneously apparent whether a refusal to grant a prospective franchisee's application is necessarily reasonable or not. The legislative decision to delegate to jurists the task of construing and enforcing section 621(a)(1)'s insistence on reasonableness suggests that the statutory phrase at issue is capable of multiple meanings. To choose between these several meanings, courts will have to engage in fact-finding and uncover the particularities of the case at hand. Thus, to give meaning to an "unreasonable denial" will depend upon "a specific factual scenario." *Beck*, 390 F.3d at 920. Coupled with case law finding the term "reasonable" generally to engender ambiguity, the fact-sensitive nature of the reasonableness inquiry in the instant context indicates that section 621(a)(1)'s usage of "unreasonably" is ambiguous under *Chevron's* first step. Accordingly, our next task is to determine whether the FCC's explication of this statutory ambiguity is reasonable.

2. *Chevron Step 2: Reasonableness of the Order*

At this juncture, we must decide whether the FCC's Order constitutes a permissible construction of the pivotal statutory phrase, "unreasonably refuse to award," within section 621(a)(1). In answering this

question, we "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading [we] would have reached if the question initially had arisen in a judicial proceeding." *Battle Creek Health System v. Leavitt*, 498 F.3d 401, 408-09 (6th Cir. 2007) (internal quotations omitted). A review of the legislative history as well the language of the provision at issue is the chief method by which we approach the second step of *Chevron*. *Difford v. Secretary of Health and Human Services*, 910 F.2d 1316, 1318 (6th Cir. 1990). Because the Order encompasses four different rules specifying the meaning of "unreasonably refuse" within section 621(a)(1), we proceed by assessing the reasonableness of each rule in its own right.

a. *Rule 1: Timing Requirements for Awarding New Franchises*

The first rule contained in the Order concerns the time period within which LFAs must address franchise applications to satisfy section 621(a)(1)'s requirement of reasonableness. The FCC selected 90 days and six months as the time frames within which LFAs must respectively rule on the proposals of applicants with existing access to rights-of-way and wholly new applicants. The FCC further prescribed temporary interim franchises as a remedy for an LFA's failure to comply with the applicable time frame.

Urging this Court to reject the timing requirement as an impermissible construction of the statute, petitioners characterize this portion of the Order as "creating an arbitrary shot-clock for new franchise applications" and "spawning unilaterally-imposed interim franchises permitting unauthorized access to public and private property and denying community needs and interests." (Petitioner ACM's Br. 28-29.) The FCC, on the other hand, insists that the time frames are a lawful and reasonable regulatory response to "unreasonable delays in the franchising process." (Respondent's Br. 39-40.)

To determine whether we should defer to the time limits as a permissible construction of the Act, it is instructive to examine how durational requirements surface in other portions of Title VI. In several other sections of the Act addressing cable franchises, Congress expressly incorporated timing requirements into the statutory language. Section 617, for example, relates to the sale of cable systems and states that, if the issuance of a franchise requires that an LFA approve the sale or transfer of a cable system, the LFA must act within 120 days. 47 U.S.C. § 537. Likewise, section 625 mandates that modifications of franchise terms occur within 120 days of the request. 47 U.S.C. § 545.

While express durational requirements govern these aspects of the franchising process, the statutory scheme is silent with respect to time limits governing the issuance of new franchises under section 621(a)(1). In light of this silence, petitioners urge us

to adopt the canon of construction *expressio unius est exclusio alterius*—explicit direction for something in one provision, and its absence in a parallel provision, implies an intent to negate it in the second. That is, according to petitioners, if Congress had intended that LFAs act within a certain time period in awarding new franchises, it seems logical to assume that it would have followed the course of these other sections by integrating express durational requirements into the statutory language of section 621(a)( ). Thus, under petitioners' view, even if the language of section 621(a)(1) is ambiguous, the agency has formulated an impermissible construction of the statute by reading into the text durational requirements that contravene Congress's intentional decision to forego such requirements. *See Whitman v. American Trucking Ass'n.*, 531 U.S. 457, 467 (2001) (refusing to "find implicit in ambiguous sections of the [Clean Air Act] an authorization to consider costs that has elsewhere, and so often, been expressly granted."); *General Motors Corp. v. United States*, 496 U.S. 530, 538 (1990) (explaining that "[s]ince the statutory language does not expressly impose a 4-month deadline and Congress expressly included other deadlines in the statute, it seems likely that Congress acted intentionally in omitting the 4-month deadline in § 110(a)(3)(A)."); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

While petitioners are correct in identifying the *expressio* tool as one canon of statutory interpretation, their analysis fails to recognize that the utility of the *expressio* canon in the context of the *Chevron* inquiry has been questioned. In *Cheney R.R. Co. v. I.C.C.*, 902 F.2d 66, 69 (D.C. Cir. 1990), for example, the D.C. Circuit explained that, under *Chevron*, Congressional silence is to be construed as creating a presumption of a gap-filling delegation to agencies. Against this presumption, the *expressio* canon emerges as "an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Cheney R.R. Co.*, 902 F.2d at 69. Likewise, in *General Motors Corp. v. NHTSA*, 898 F.2d 165, 170 (D.C. Cir. 1990), the D.C. Circuit held that, where a statute includes an "express deadline" for one category of decisions but not another, the absence of a statutory deadline for the latter category "could mean either that no deadline was contemplated by Congress, or that Congress left the choice to [the agency] whether or not to impose a deadline." We find the reasoning in *General Motors Corp.* to be persuasive. That is, the absence of a statutory deadline in section 621(a)(1) leads us to conclude that Congress authorized, but did not require, the FCC to impose time limits on the issuance of new franchises.

Moreover, the nature of the franchising process counsels in favor the reasonableness of the time limits the FCC selected. We have previously

noted that administrative lines "need not be drawn with mathematical precision." *Kirk v. Secretary of Health & Human Serv.*, 667 F.2d 524, 532 (6th Cir. 1981). Courts are "generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem." *Covad Comm. Co. v. FCC*, 450 F.3d 528, 541 (D.C. Cir. 2006) (internal quotations omitted). We conclude that petitioners have failed to demonstrate the patent unreasonableness of the durational requirements.

First, the reasons mobilizing the FCC to promulgate these time limits appear more than reasonable. Due to protracted franchise negotiations, the agency found that prospective entrants were abandoning attempts to join the cable market and acceding to otherwise unacceptable franchise terms simply to expedite the process. The Commission thus prescribed the time frames as a way to remedy the "excessive delays result[ing] in unreasonable refusals to award competitive franchises," and reverse the factors "depriv[ing] consumers of competitive video services" and "hamper[ing] broadband deployment." (*Id.*) In furtherance of these ends, the FCC reasonably found that six months would provide LFAs with "a reasonable amount of time to negotiate with an entity that is not already authorized to occupy" rights-of-way. (JA 527.) This determination was predicated on "substantial [record] evidence that six months provides LFAs sufficient time to review an

applicant's proposal, negotiate acceptable terms, and award or deny a competitive franchise." (*Id.*)

Similarly, for companies with existing access to rights-of-way, the FCC reasonably found that their cable franchise applications should take less time to review and process because "an LFA need not devote substantial attention to issues of rights-of-way management." (JA 525.) Specifically, the agency explained that since incumbent cable operators already demonstrated their "legal, technical, and financial fitness" to use rights-of-way to provide service, "an LFA need not spend a significant amount of time considering the fitness of such applicants to access public rights-of-way." (JA 526.) That 90 days represents a reasonable time frame for incumbent providers is underscored by the fact that numerous state statutes require decisions on cable franchise applications in fewer than 90 days. (JA 499.) Accordingly, we conclude that the first rule included in the Order represents a permissible construction of the statute.

b. *Rule 2: Limitations on Build-Out Requirements*

The second rule contained in the Order places limits on the use of build-out requirements as a franchise term. Specifically, the Commission explained that "an LFA's refusal to grant a competitive franchise because of an applicant's unwillingness to agree to unreasonable build-out mandates constitutes an unreasonable refusal to

award a competitive franchise." (JA 493.) The Order further stipulates types of mandates that would qualify as unreasonable, such as requiring an operator to serve everyone in a given area as a precondition for providing service, requiring incumbent operators to "build out beyond the footprint of their existing facilities before they have even begun providing service," and placing more stringent service requirements on new entrants than those facing incumbent operators. (JA 533.) In contrast, the agency described as reasonable an LFA's consideration of "benchmarks requiring the new entrant to increase its build-out after a reasonable period of time had passed after initiating service and taking into account its market success." (*Id.*)

In arguing for the unreasonableness of this second rule, petitioners assert that the agency has effectively "amend[ed] the will of Congress by adding exceptions to a statute that do not otherwise exist." (Petitioner ACM's Br. 33; *see also* Petitioner Tampa's Br. 43; Petitioner New York City's Br. 7). That is, petitioners claim that "[s]everal of the scenarios identified by the FCC as examples of 'unreasonable build-out mandates' involve issues that have nothing to do with the one and only condition placed on an LFA by Congress – namely, that an LFA must allow a reasonable period of time for build-out." (Petitioner ACM's Br. 34.)

The agency, in turn, retorts that this second rule is both lawful and reasonable because it sensibly responds to the state of the record evidence.

Based on the its extensive fact-finding, the FCC discovered that commanding prospective cable entrants to expand rapidly their networks "greatly hinder[s] the deployment of new video and broadband services." (Respondent's Br. 33; JA 506.) Beyond the entry-deterring effects of build-out requirements, the agency maintains that its limitations on build-out mandates are "in effect timing restrictions" that accordingly fall well within Congress's requirement that LFAs provide a reasonable period of time for build-out. (Respondent's Br. 55.)

Despite their differing interpretations of the provision, petitioners and respondent correctly identify section 621(a)(4)(A) of the Act as the appropriate starting point for establishing the reasonableness of the Order's second rule. Under this section, the only express constraint on an LFA's ability to impose build-out requirements is that it "shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area." 47 U.S.C. § 541(a)(4)(A). The question before us then is whether the FCC's restrictions on build-out requirements represent a reasonable construction of section 621(a)(4)(A).

At the most fundamental level, petitioners and respondent are enmeshed in a quarrel over whether section 621(a)(4)(A) confers on LFAs the *right* to impose build-out requirements (as petitioners would have it) or amounts to a *limitation* on the authority of LFAs to secure build-out requirements through

franchise negotiations (as respondent would have it). In ascertaining the reasonableness of this second rule under *Chevron*, the legislative history of section 621(a)(4)(A) can help to illuminate whether the statutory text is better characterized as a rights-conferring or an authority-limiting provision.

When integrating section 621(a)(4)(A) into the Act through the 1984 Amendments, Congress enacted the current version of the statute from which the following language was excised: an LFA's "refusal to award a franchise shall not be unreasonable if, for example, such refusal is on the ground . . . of inadequate assurance that the cable operator will, within a reasonable period of time, provide universal service throughout the entire franchise area." H.R. Rep. No. 102-628 at 9 (1992). That is, Congress explicitly considered and rejected the preceding language, which would have situated all build-out requirements as presumptively reasonable. Under this discarded version, the key phrase "shall not be unreasonable" indicates that LFAs would have exercised the affirmative right to impose build-out requirements on prospective entrants.

In contrast, under the existing version of section 621(a)(4)(A), the statutory language fixes a durational requirement on LFAs when attaching build-out mandates to the terms of a franchise. The language, however, does not establish a presumption of reasonableness underlying all build-out requirements. That is, it is quite possible for an LFA to furnish a cable entrant with "a reasonable period

of time to become cable of providing cable service to all households in the franchise area" yet still act unreasonably overall in imposing the build-out requirement on the entrant in the first place. Thus, in light of Congress's patent consideration and rejection of statutory language that would have created a presumption of reasonableness surrounding build-out requirements, we find the FCC to have the better argument. Accordingly, section 621(a)(4)(A) is more aptly designated as a limitation on the authority of LFAs, rather than an affirmative bestowal of rights. The FCC's subsequent explication of this limitation on build-out requirements, in the context of section 621(a)(1)'s requirement of reasonableness, thus appears to us a permissible construction of the Act, which warrants judicial deference under *Chevron*.

c. *Rule 3: Franchise Fees*

As part of its third rule addressing franchise fees, the Order construes the scope of the statutory five percent cap on fees located under section 622(b) of the Act. 47 U.S.C. § 542(b). This cap prohibits an LFA from charging a franchise fee in excess of five percent of a cable operator's revenues from the provision of cable services. *Id.* Excluded from the definition of "franchise fee" and thereby from the five percent cap, however, are "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification,

penalties, or liquidated damages." 47 U.S.C. § 542(g)(2)(D).

Interpreting sections 622(b) and 622(g)(2)(D) in light of section 621(a)(1)'s reasonableness requirement, the Order enumerates the non-incidental charges that must fall within the purview of the statutory cap, including attorneys' and consultants' fees, "application or processing fees that exceed the reasonable cost of processing the application, acceptance fees, free or discounted services provided to an LFA, any requirement to lease or purchase equipment from an LFA at prices higher than market value, and in-kind payments." (JA 539.) Likewise, "any requests made by LFAs that are unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap." (JA 539.) The Order further insists that "a cable operator is not required to pay franchise fees on revenues from non-cable services." (JA 536.)

Asserting the unreasonableness of the Commission's fee regulations, petitioners contend that the FCC's interpretation of "incidental to" in section 622(g)(2)(D) violates the plain meaning of "incidental", which is defined as "happening or likely to happen in an unplanned or subordinate conjunction with something else" or "incurred casually and in addition to the regular or main amount." (Petitioner Fairfax County's Br. 53.) In other words, petitioners contest the FCC's per se listing of fees that count as non-incidental because such an approach contravenes the

"statutory test [which] is whether an item is related to the awarding or enforcing of the franchise." (*Id.*) Rather than prioritizing relatedness to the awarding of a franchise, petitioners insist that the FCC's list prioritizes the substantiality of the charges. They point to application fees and expenses incurred in review of an application as examples of charges that, regardless of their size or relation to market value, undoubtedly arise in connection with the award of a franchise. By confounding "incidental to" with "substantial," petitioners urge this Court to reject the FCC's rules on franchise fees as unreasonable.

The FCC, in contrast, supports its position in the Order by marshaling case law from three district court opinions, *Time Warner Entertainment v. Briggs*, 1993 WL 23710 (D. Mass. Jan 14, 1993), *Birmingham Cable Comm. v. City of Birmingham*, 1989 WL 253850 (N.D. Ala. 1989), and *Robin Cable Sys. v. City of Sierra Vista*, 842 F. Supp. 380 (D. Ariz. 1993). In *Time Warner Entertainment*, the court found that reimbursements for attorney's and consultant's fees imposed during a franchise award constituted "franchise fees" within the meaning of 47 U.S.C. § 542 and were thus subject to the statutory cap. 1993 WL 23710 at *6. The court in *Birmingham Cable*, addressing the phrase "incidental to," held that "it would be an aberrant construction . . . to conclude that the phrase embraces consultant fees incurred solely by the City." 1989 WL 253850 at *1, n.2. And in *Robin Cable Systems*, the court explained that exceptions to the franchise fee cap are to be "narrowly tailored." 842 F. Supp. at 381. Taken together, the FCC asserts that

these three decisions further cast its interpretation as reasonable.

Considering the foregoing, we grant *Chevron* deference to the FCC's rules regarding fees because they qualify as reasonable constructions of sections 622(b) and 622(g)(2)(D). In circumscribing the boundaries of our role under the *Chevron* doctrine, we have emphasized that we "need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading [we] would have reached if the question initially had arisen in a judicial proceeding." *Battle Creek Health System*, 498 F.3d at 408-09 (internal quotations omitted). Thus, the fact that "incidental to" lends itself to multiple readings–the one highlighted by petitioners and the one highlighted by the agency–is alone insufficient to render the Commission's interpretation unreasonable. Moreover, while not binding precedent on us, the fact that three district courts independently arrived at the same interpretation of "incidental to" as the Commission lends further credence to the rules governing franchise fees in the Order. Since petitioners have provided no evidence to refute the reasonableness of a necessity requirement built into the "incidental to" criterion, we defer to the agency's interpretation as reasonable.

d. *Rule 4: Limitations on PEG Capacity*

The fourth rule the FCC formulated concerns PEG requirements. In conducting the inquiry called

for by *Chevron*, the pivotal statutory language appears in section 622(g)(2)(C), which exempts from the definition of "franchise fee" the "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental [PEG] access facilities." 47 U.S.C. § 542(g)(2)(C). Faced with section 622(g)(2)(C), the agency differentiated between "costs incurred in or associated with the construction of PEG access facilities," which qualify as capital costs and therefore fall into the franchisee fee exclusion, and "payments in support of the use of PEG access facilities," which do not qualify as capital costs and so are subject to the statutory cap on franchise fees. (JA 540-41.) Salaries and training in support of the use of PEG access facilities fall into the latter category, for example, and so are counted toward the five percent limit.

The agency further concluded that while LFAs may seek assurances from prospective cable operators that they will provide PEG access channel capacity, they "may not make unreasonable demands of competitive applicants for PEG." (JA 541.) For instance, it would be "unreasonable for an LFA to impose on a new entrant more burdensome PEG carriage obligations than it has imposed upon the incumbent cable operator." (JA 543.) On the other hand, the agency classified as "*per se* reasonable" a "*pro rata* cost sharing approach" in which a "new entrant agrees to share *pro rata* costs with the incumbent operator." (JA 544.)

Confronting the agency's interpretation of "capital costs," petitioners maintain that it is unreasonable and contrary to Congress's intent. First, petitioners attack the rule for its supposed distinction between PEG facilities versus PEG equipment. In laying out this argument, petitioners state that the FCC's reading narrows "capital costs" to only the "costs related to the construction of PEG facilities." (Petitioner Fairfax County's Br. 56.) This interpretation overlooks the fact that "[m]any LFAs . . . including Fairfax County . . . receive payments from cable operators that are used not simply for the construction of PEG access studios, but also for the acquisition of equipment needed to produce PEG access programming such as cameras and editing equipment." (*Id.*) Fairfax County thus asserts that, "to the extent that the FCC apparently meant to exclude equipment from the term 'capital costs,' the Order directly contradicts the language of the statute." (*Id.*)

In response, the FCC insists that its interpretation does not signify that the term "capital costs" necessarily excludes equipment. (Respondent's Br. 71.) Instead, the Commission underscores that the central test for determining whether an expense is a capital cost is whether it is "incurred in or associated with the construction of PEG access facilities." (*Id.*) This definition could potentially encompass the cost of purchasing equipment, as long as that equipment relates to the construction of actual facilities.

To determine the permissibility of the Commission's construction of section 622(g)(2)(C), we start by consulting the legislative history. During the enactment of this provision, Congress made clear that it intended section 622(g)(2)(C) to reach "capital costs *associated with the construction of* [PEG] access facilities." H.R. Rep. No. 98-934, at 26 (emphasis added). Against this legislative pronouncement, the FCC's limitation of "capital costs" to those "incurred in or associated with the construction fo PEG access facilities" represents an eminently reasonable construction of section 622(g)(2)(C).

The next question that arises is whether the FCC intended to limit its definition of capital costs only to facilities and not to equipment and, if so, whether this is a permissible construction of section 622(g)(2)(C). In clarifying the precise scope of the term "PEG access facilities," Congress explained that it refers to "channel capacity (including any channel or portion of any channel) designated for public, educational, or governmental use, as well as facilities *and equipment* for the use of such channel capacity." H. R. Rep. No. 98-934, at 45 (emphasis added). In further detail, Congress specified that "[t]his may include vans, studios, cameras, or other equipment relating to the use of public, educational, or governmental channel capacity." *Id.* Thus, the unambiguous expression of Congress confirms that "PEG access capacity" extends not only to facilities but to related equipment as well. Considering both this clear Congressional statement, coupled with the fact that the agency concedes that its definition of

"capital costs" covers the expense of equipment as long as it is "incurred in or associated with the construction of PEG access facilities," we reject Fairfax County's attempt to create an arbitrary distinction between facilities and equipment as baseless.

To sustain the fourth rule's reasonableness in its entirety, the last question we must address is whether the Order's stipulation regarding unreasonable PEG carriage obligations and pro rata sharing schemes is a permissible construction of sections 611 and 621. Section 611(a) establishes the authority of LFAs to call for franchise terms relating to the "use of channel capacity for public, educational, or governmental use" but "only to the extent provided in this section." 47 U.S.C. § 531(a). Section 621(a)(4)(B), in turn, states that, "in awarding a franchise," an LFA "may require adequate assurance that the cable operator will provide adequate public, educational, or governmental access channel capacity, facilities, or financial support." 47 U.S.C. § 541(a)(4)(B). The FCC claims that its rules regarding PEG carriage obligations and pro rata sharing give concrete meaning to the statutory term "adequate" in section 621(a)(4)(B). That is, the term "adequate" takes shape in relation to section 621(a)(1)'s reasonableness requirement: "LFAs that impose PEG . . . commitments on new entrants in excess of what is "adequate" . . . violate section 621(a)'s prohibition on 'unreasonable refusals' to award competitive franchises." (Respondent's Br. 72.)

Rejecting the guidelines the agency adopted to clarify the meaning of "adequate," petitioners argue that "adequate" does not lend itself to the formulation of per se rules. Furthermore, petitioner ACM insists that the agency's prescription of rigid rules regarding PEG carriage obligations impedes the ability of LFAs to respond to changing community needs. Both sets of arguments, however, are without merit.

First, Congress's use of the word "adequate" in section 621(a)(4)(B) is an example of a statute that is "ambiguous . . . for purposes of *Chevron* analysis, without being inartful or deficient." *Haggar Apparel*, 526 U.S. at 392. Congress's reliance on the term "adequate" "exemplifies the familiar proposition that [it] need not, and likely cannot, anticipate all circumstances in which a general policy must be given specific effect." *Id.* The Commission thus acted well within its discretion when it ruled that "LFAs are free to establish their own requirements for PEG," subject to the limited constraints imposed to prevent violations of section 621(a)(1). (JA 542.) Such rule-making by the agency represents a lawful exercise of its gap-filling authority and thus deserves our deference under *Chevron*.

Likewise, petitioners' charge that the FCC's rules regarding PEG carriage obligations prevent attention to community needs is also tenuous at best. While the FCC's guidelines prohibit LFAs from requiring new entrants to assume "more burdensome" PEG obligations than existing providers, nothing in this standard prevents LFAs from harmonizing the

PEG obligations new suppliers do assume with local interests. Moreover, nothing in the Order bars LFAs from updating the PEG obligations incumbents face during franchise renewal proceedings, thereby permitting the PEG obligations new entrants shoulder to likewise reflect the most current needs of the community. Overall then, the FCC's construal of PEG access facilities and "capital costs" comport with the legislative history and the overall statutory structure and thereby qualify for deference under *Chevron*.

C. Arbitrary and Capricious Analysis

As their final ground for relief, petitioners challenge the FCC's rule-making activity as arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law. Specifically, petitioners insist that the Order is based on a record replete with "allegations against LFAs which are anonymous, hearsay-based, inaccurate, and outdated." (Petitioner ACM's Br. 7.) Notwithstanding petitioners' contention, we conclude that the FCC's rulemaking activity was rooted in a sufficient evidentiary basis. The contours of judicial review for arbitrary and capricious agency behavior are well-established. Courts deem agency action to be arbitrary and capricious if

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered

> an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.
>
> *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

Likewise, agency action is "not in accordance with the law" when "it is in conflict with the language of the statute relied upon by the agency." *City of Cleveland v. Ohio*, 508 F.3d 827, 838 (6th Cir. 2007). Pursuant to arbitrary-and-capricious review, we must canvass the record to determine whether there exists a "rational connection between the facts found and the choice made." *State Farm Mut. Auto Ins. Co.*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962)). Upon conducting this searching inquiry, we are required to grant "controlling weight" to the agency's regulatory activity "unless it is plainly erroneous or inconsistent with" the underlying statute. *Battle Creek Health System*, 498 F.3d at 409.

Turning to the record, it appears that the FCC spearheaded its regulatory activity only after pursuing a more than adequate fact-finding endeavor. That is, there is ample record evidence supporting the Commission's finding that the operation of the franchising process had impeded competitive entry in multiple ways. Prior to promulgating the Order, the

FCC obtained a massive record consisting of 465 comments. These 465 comments created a picture of excessive delay in the grant of new franchises. For example, Verizon' s comments indicated that, of its 113 franchise negotiations pending as of March 2005, only ten resulted in franchise grants after one year. Likewise, comments from petitioner NTCA reflected that a "common complaint . . . is that applications for franchising authority languish, unreasonably delaying the franchise process and the ability of competitors to offer service." (JA 1587.) Similar comments from BellSouth and other service providers make clear that the Order's attempt to remedy the problem of undue delay was consistent with the evidence before the Commission and represents a "rational connection between the facts found and the choice made." *State Farm Mut. Auto Ins. Co.*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168).

In a similar vein, the 465 comments presented to the Commission contained substantial evidence that build-out requirements were posing significant obstacles to new entrants in providing video and broadband services. For example, comments submitted by service provider Qwest indicated that it withdrew franchise applications in eight different regions due to economically burdensome build-out requirements. Likewise, the record demonstrated that LFAs were imposing various demands on service providers, including those unrelated to cable service, those involving excessive franchise fees, and those involving excessive PEG requirements, that were significantly escalating prospective entrants' costs

and thereby deterring entry. Based on the foregoing, we conclude that the administrative record fully supported the agency's rulemaking and belies any claims of arbitrary or capricious regulatory activity.

III. CONCLUSION

For the reasons articulated above, we DENY the petitions for review.

APPENDIX B
Judgment of the United States Court of Appeals for the Sixth Circuit (June 27, 2008)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 07-3391/3569/3570/3571/3572/3573/3574/
3673/3674/3675/3676/3677/3824

ALLIANCE FOR COMMUNITY MEDIA, et al.,
Petitioners,
STATE OF HAWAII; CITY AND COUNTY OF SAN FRANCISCO; NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, INC.; CITY OF NEW YORK; CITY OF MILWAUKEE, WISCONSIN; CITY OF WHITE PLAINS, NEW YORK; CITY OF WILMINGTON, DELAWARE,
Intervenors,
v.
FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,
Respondents,
AD HOC TELECOM MANUFACTURER COALITION; QWEST COMMUNICATIONS INTERNATIONAL, INC.; USTELECOM; VERIZON; AT&T,
Intervenors.

Before: SUHRHEINRICH, COLE, and GIBBONS, Circuit Judges.

JUDGMENT

THIS MATTER came before the court upon petitions for review of an order of the Federal Communications Commission.

UPON FULL REVIEW of the record and the briefs and arguments of counsel,

IT IS ORDERED, that the petitions for review are DENIED.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

June 27, 2008

APPENDIX C
Federal Communications Commission Report and Order and Further Notice of Proposed Rulemaking

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section	)	MB Docket No.
621(a)(1) of the Cable	)	05-311
Communications Policy Act of	)	
1984 as amended by the Cable	)	
Television Consumer Protection	)	
and Competition Act of 1992	)	

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: December 20, 2006
Released: March 5, 2007

By the Commission: Chairman Martin, Commissioners Tate and McDowell issuing separate statements; Commissioners Copps and Adelstein dissenting and issuing separate statements.

I. INTRODUCTION

1. In this Report and Order ("*Order*"), we adopt rules and provide guidance to implement Section 621(a)(1) of the Communications Act of 1934, as amended (the "Communications Act"), which prohibits franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services.[1] We find that the current operation of the local franchising process in many jurisdictions constitutes an unreasonable barrier to entry that impedes the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment.[2]

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[1] 47 U.S.C. § 541(a)(1).

[2] While there is a sufficient record before us to generally determine what constitutes an "unreasonable refusal to award an additional competitive franchise" at the local level under Section 621(a)(1), we do not have sufficient information to make such determinations with respect to franchising decisions where a state is involved, either by issuing franchises at the state level or enacting laws governing specific aspects of the franchising process. We therefore expressly limit our findings and regulations in this *Order* to actions or inactions at the local level where a state has not specifically circumscribed the LFA's authority. In light of the differences between the scope of franchises issued at the state level and those issued at the local level, we do not address the reasonableness of demands made by state level franchising authorities, such as Hawaii, which may need to be evaluated by different criteria than those applied to the demands of local franchising authorities. Additionally, what constitutes an unreasonable period of time for a state level franchising authority to take to review an application may differ from what constitutes an unreasonable

(continued)

(Continued from previous page)
period of time at the local level. Moreover, as discussed *infra*, many states have enacted comprehensive franchise reform laws designed to facilitate competitive entry. Some of these laws allow competitive entrants to obtain statewide franchises while others establish a comprehensive set of statewide parameters that cabin the discretion of LFAs. *Compare* TEX. UTIL. CODE ANN. §§ 66.001-66.017 *with* VA. CODE ANN. §§ 15.2-2108.19 et seq. In light of the fact that many of these laws have only been in effect for a short period of time, and we do not have an adequate record from those relatively few states that have had statewide franchising for a longer period of time to draw general conclusions with respect to the operation of the franchising process where there is state involvement, we lack a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises. As a result, our *Order* today only addresses decisions made by county- or municipal-level franchising authorities. *See U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 86 (D.C. Cir. 2001) ("agencies need not address all problems in one fell swoop") (citations and internal quotation marks omitted); *Personal Watercraft Industry Assoc. v. Dept. of Commerce*, 48 F.3d 540, 544 (D.C. Cir. 1995) ("An agency does not have to 'make progress on every front before it can make progress on any front.') (quoting *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993)); *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) ("[A]gencies, while entitled to less deference than Congress, nonetheless need not deal in one fell swoop with the entire breadth of a novel development; instead, 'reform may take place one step at a time, addressing itself to the phase of the problem which seems most acute to the [regulatory] mind.'") (citations and internal quotation marks omitted, alteration in original). Moreover, it does not address any aspect of an LFA's decision-making to the extent that such aspect is specifically addressed by state law. For example, the state of Massachusetts provides LFAs with 12 months from the
(continued)

We further find that Commission action to address this problem is both authorized and necessary. Accordingly, we adopt measures to address a variety of means by which local franchising authorities, i.e., county- or municipal-level franchising authorities ("LFAs"), are unreasonably refusing to award competitive franchises. We anticipate that the rules and guidance we adopt today will facilitate and expedite entry of new cable competitors into the market for the delivery of video programming,[3] and accelerate broadband deployment consistent with our statutory responsibilities.

2. New competitors are entering markets for the delivery of services historically offered by monopolists: traditional phone companies are primed to enter the cable market, while traditional cable companies are competing in the telephony market. Ultimately, both types of companies are projected to offer customers a "triple play" of voice, high-speed Internet access, and video services over

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date of their decision to begin the licensing process to approve or deny a franchise application. 207 Mass. Code Regs. 3.02 (2006). These laws are not addressed by this decision. Consequently, unless otherwise stated, references herein to "the franchising process" or "franchising" refer solely to processes controlled by county- or municipal-level franchising authorities, including but not limited to the ultimate decision to award a franchise.

[3] References throughout this *Order* to "video programming" or "video services" are intended to mean cable services.

their respective networks. We believe this competition for delivery of bundled services will benefit consumers by driving down prices and improving the quality of service offerings. We are concerned, however, that traditional phone companies seeking to enter the video market face unreasonable regulatory obstacles, to the detriment of competition generally and cable subscribers in particular.

3. The Communications Act sets forth the basic rules concerning what franchising authorities may and may not do in evaluating applications for competitive franchises. Despite the parameters established by the Communications Act, however, operation of the franchising process has proven far more complex and time consuming than it should be, particularly with respect to facilities-based telecommunications and broadband providers that already have access to rights-of-way. New entrants have demonstrated that they are willing and able to upgrade their networks to provide video services, but the current operation of the franchising process at the local level unreasonably delays and, in some cases, derails these efforts due to LFAs' unreasonable demands on competitive applicants. These delays discourage investment in the fiber-based infrastructure necessary for the provision of advanced broadband services, because franchise applicants do not have the promise of revenues from video services to offset the costs of such deployment. Thus, the current operation of the franchising process often not only contravenes the statutory

imperative to foster competition in the multichannel video programming distribution ("MVPD") market, but also defeats the congressional goal of encouraging broadband deployment.

4. In light of the problems with the current operation of the franchising process, we believe that it is now appropriate for the Commission to exercise its authority and take steps to prevent LFAs from unreasonably refusing to award competitive franchises. We have broad rulemaking authority to implement the provisions of the Communications Act, including Title VI generally and Section 621(a)(1) in particular. In addition, Section 706 of the Telecommunications Act of 1996 directs the Commission to encourage broadband deployment by removing barriers to infrastructure investment, and the U.S. Court of Appeals for the District of Columbia Circuit has held that the Commission may fashion its rules to fulfill the goals of Section 706.[4]

5. To eliminate the unreasonable barriers to entry into the cable market, and to encourage investment in broadband facilities, we: (1) find that an LFA's failure to issue a decision on a competitive application within the time frames specified herein constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1); (2) find that an LFA's refusal to grant a

[4] *See USTA v. FCC*, 359 F.3d 554, 579-80 (D.C. Cir. 2004).

competitive franchise because of an applicant's unwillingness to agree to unreasonable build-out mandates constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1); (3) find that unless certain specified costs, fees, and other compensation required by LFAs are counted toward the statutory 5 percent cap on franchise fees, demanding them could result in an unreasonable refusal to award a competitive franchise; (4) find that it would be an unreasonable refusal to award a competitive franchise if the LFA denied an application based upon a new entrant's refusal to undertake certain obligations relating to public, educational, and government ("PEG") and institutional networks ("I-Nets") and (5) find that it is unreasonable under Section 621(a)(1) for an LFA to refuse to grant a franchise based on issues related to non-cable services or facilities. Furthermore, we preempt local laws, regulations, and requirements, including level-playing-field provisions, to the extent they permit LFAs to impose greater restrictions on market entry than the rules adopted herein. We also adopt a Further Notice of Proposed Rulemaking ("FNPRM") seeking comment on how our findings in this *Order* should affect existing franchisees. In addition, the FNPRM asks for comment on local consumer protection and customer service standards as applied to new entrants.

II. BACKGROUND

6. ***Section 621.*** Any new entrant seeking to offer "cable service"[5] as a "cable operator"[6] becomes subject to the requirements of Title VI. Section 621 of Title VI sets forth general cable franchise requirements. Subsection (b)(1) of Section 621 prohibits a cable operator from providing cable service in a particular area without first obtaining a cable franchise,[7] and subsection (a)(1) grants to franchising authorities the power to award such franchises.[8]

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[5] Section 602(6) of the Communications Act, 47 U.S.C. § 522(6) (defining "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service").

[6] Section 602(5) of the Communications Act, 47 U.S.C. § 522(5) (defining "cable operator" as "any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in a cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system").

[7] 47 U.S.C. § 541(b)(1) ("Except to the extent provided in paragraph (2) and subsection (f), a cable operator may not provide cable service without a franchise.").

[8] 47 U.S.C. § 541(a)(1) (stating that "[a] franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction"). A "franchising authority" is defined to mean "any governmental entity empowered by Federal, State, or local law to grant a franchise."

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7. The initial purpose of Section 621(a)(1), which was added to the Communications Act by the Cable Communications Policy Act of 1984 (the "1984 Cable Act"),[9] was to delineate the role of LFAs in the franchising process.[10] As originally enacted, Section 621(a)(1) simply stated that "[a] franchising

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Section 602(10) of the Communications Act, 47 U.S.C. § 522(10). As noted above, references herein to "local franchising authorities" or "LFAs" mean only the county or municipal governmental entities empowered to grant franchises.

[9] Cable Communications Policy Act of 1984, Pub. L No. 98-549, 98 Stat. 2779.

[10] *See, e.g.*, H.R. REP. NO. 98-934, at 19 (1984) ("[The 1984 Cable Act] establishes a national policy that clarifies the current system of local, state and federal regulation of cable television. This policy continues reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process. ... [This legislation] will preserve the critical role of municipal governments in the franchise process, while providing appropriate deregulation in certain respects to the provision of cable service."); *id.* at 24 ("It is the Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs. However, if that process is to further the purposes of this legislation, the provisions of these franchises, and the authority of the municipal governments to enforce these provisions, must be based on certain important uniform federal standards that are not continually altered by Federal, state and local regulation.").

authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction."[11] A few years later, however, the Commission prepared a report to Congress on the cable industry pursuant to the requirements of the 1984 Cable Act.[12] In that Report, the Commission concluded that in order "[t]o encourage more robust competition in the local video marketplace, the Congress should ... forbid local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service."[13]

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[11] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, § 621 (1984).

[12] *See generally Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962 (1990) ("Report").

[13] *Id.* at 4974; *see also id.* at 5012 ("This Commission is convinced that the most effective method of promoting the interests of viewers or consumers is through the free play of competitive market forces."). The Report also recommended that Congress "prohibit franchising rules whose intent or effect is to create unreasonable barriers to the entry of potential competing multichannel video providers," "limit local franchising requirements to appropriate governmental interests (*e.g.*, public health and safety, repair and good condition of public rights-of-way, and the posting of an appropriate construction bond)," and "permit competitors to enter a market pursuant to an initial, time-limited suspension of any 'universal [build-out]' obligation." *Id.*

8. In response,[14] Congress revised Section 621(a)(1) through the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act")[15] to read as follows: "A franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and *may not unreasonably refuse to award an additional competitive franchise*."[16] In the Conference Report on the legislation, Congress found that competition in the cable industry was sorely lacking:

> For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing

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[14] *See* H.R. REP. NO. 102-628, at 47 (1992) ("The Commission recommended that Congress, in order to encourage more robust competition in the local video marketplace, prevent local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service."). The Commission has previously recognized that "Congress incorporated the Commission's recommendations in the 1992 Cable Act by amending § 621(a)(1) of the Communications Act." *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming)*, 9 FCC Rcd 7442, 7469 (1994).

[15] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

[16] 47 U.S.C. § 541(a)(1) (emphasis added).

> more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers.[17]

To address this problem, Congress abridged local government authority over the franchising process to promote greater cable competition:

> Based on the evidence in the record taken as a whole, it is clear that there are benefits from competition between two cable systems. Thus, the Committee believes that local franchising authorities should be encouraged to award second franchises. Accordingly, [the 1992 Cable Act] as reported, prohibits local franchising authorities from unreasonably refusing to grant second franchises.[18]

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[17] H.R. CONF. REP. NO. 102-862, at 1231 (1992).

[18] S. REP. NO. 102-92, at 47 (1991).

As revised, Section 621(a)(1) establishes a clear, federal-level limitation on the authority of LFAs in the franchising process in order to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media," and to "rely on the marketplace, to the maximum extent feasible, to achieve that availability."[19] Congress further recognized that increased competition in the video programming industry would curb excessive rate increases and enhance customer service, two areas in particular which Congress found had deteriorated because of the monopoly power of cable operators brought about, at least in part, by the local franchising process.[20]

9. In 1992, Congress also revised Section 621(a)(1) to provide that "[a]ny applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 635."[21] Section 635, in turn, states that

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[19] *Id.*

[20] S. REP. NO. 102-92, at 9 (quoting members of the cable industry who acknowledged that "because the franchise limits the customers to a single provider in the market, other 'customer-oriented' intangibles relating to the expectation of future patronage do not exist for a cable system. There is a goodwill in a monopoly. Customers return, not because of any sense of satisfaction with the monopolist, but rather because they have no other choices"); *see also id.* at 3-9, 13-14, 20-21.

[21] 47 U.S.C. § 541(a)(1).

"[a]ny cable operator adversely affected by any final determination made by a franchising authority under section 621(a)(1) ... may commence an action within 120 days after receiving notice of such determination" in federal court or a state court of general jurisdiction.[22] Congress did not, however, provide an explicit judicial remedy for other forms of unreasonable refusals to award competitive franchises, such as an LFA's refusal to act on a pending franchise application within a reasonable time period.

10. ***The Local Franchising NPRM.*** Notwithstanding the limitation imposed on LFAs by Section 621(a)(1), prior to commencement of this proceeding, the Commission had seen indications that the current operation of the franchising process still serves as an unreasonable barrier to entry[23] for potential new cable entrants into the MVPD market.[24] In November 2005, the Commission

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[22] 47 U.S.C. § 555(a).

[23] See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, 20 FCC Rcd 18581, 18584 (2005) ("Local Franchising NPRM") (citing comments of Alcatel, BellSouth, Broadcast Service Providers Assoc., and Consumers for Cable Choice, filed in MB Docket No. 05-255).

[24] We refer herein to "new entrants," "new cable entrants," and "new cable competitors" interchangeably. Specifically, we intend these terms to describe entities that opt to offer "cable service" over a "cable system" utilizing public rights-of-way, (continued)

issued a Notice of Proposed Rulemaking ("*Local Franchising NPRM*") to determine whether LFAs are unreasonably refusing to award competitive franchises and thereby impeding achievement of the statute's goals of increasing competition in the delivery of video programming and accelerating broadband deployment.

11. The Commission sought comment on the current environment in which new cable entrants attempt to obtain competitive cable franchises. For example, the Commission requested input on the number of: (a) LFAs in the United States; (b) competitive franchise applications filed to date;[25] and (c) ongoing franchise negotiations.[26] To determine whether the current operation of the franchising process discourages competition and broadband deployment, the Commission also sought information regarding, among other things:

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and thus are defined under the Communications Act as "cable operator[s]" that must obtain a franchise. Although we recognize that there are numerous other ways to enter the MVPD market (*e.g.*, direct broadcast satellite ("DBS"), wireless cable, private cable), our actions in this proceeding relate to our authority under Section 621(a)(1) of the Communications Act, and thus are limited to competitive entrants seeking to obtain cable franchises.

[25] *Local Franchising NPRM*, 20 FCC Rcd at 18588.

[26] *Id*.

- how much time, on average, elapses between the date a franchise application is filed and the date an LFA acts on the application, and during that period, how much time is spent in active negotiations;[27]

- whether to establish a maximum time frame for an LFA to act on an application for a competitive franchise;[28]

- whether "level-playing-field" mandates, which impose on new entrants terms and conditions identical to those in the incumbent cable operator's franchise, constitute unreasonable barriers to entry;[29]

- whether build-out requirements (*i.e.*, requirements that a franchisee deploy cable service to parts or all of the franchise area within a specified period of time) are creating unreasonable barriers to competitive entry;[30]

- specific examples of any monetary or in-kind LFA demands unrelated to cable services that could be adversely affecting

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[27] *Id.*

[28] *Id.* at 18591.

[29] *Id.* at 18588.

[30] *Id.* at 18592.

new entrants' ability to obtain franchises;[31] and

- whether current procedures or requirements are appropriate for any cable operator, including incumbent cable operators.[32]

12. In the *Local Franchising NPRM*, we tentatively concluded that Section 621(a)(1) empowers the Commission to adopt rules to ensure that the franchising process does not unduly interfere with the ability of potential competitors to provide video programming to consumers.[33] Accordingly, the Commission sought comment on how it could best remedy any problems with the current franchising process.[34]

13. The Commission also asked whether Section 706 provides a basis for the Commission to address barriers faced by would-be entrants to the

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[31] *Id. See also* Comments of Verizon, MB Docket No. 05-255 at 12 (filed Sept. 19, 2005) (arguing that "[m]any local franchising authorities unfortunately view the franchising process as an opportunity to garner from a potential new video entrant concessions that are in no way related to video services or to the rationales for requiring franchises"). *See* Appendix A for a list of all commenters and reply commenters.

[32] *Local Franchising NPRM*, 20 FCC Rcd at 18592.

[33] *Id.* at 18590.

[34] *Id.* at 18581.

video market.[35] Section 706 directs the Commission to encourage broadband deployment by utilizing "measures that promote competition ... or other regulating methods that remove barriers to infrastructure investment."[36] Competitive entrants in the video market are, in large part, deploying new fiber-based facilities that allow companies to offer the "triple play" of voice, data, and video services. New entrants' video offerings thus directly affect their roll-out of new broadband services. Revenues from cable services are, in fact, a driver for broadband deployment. In light of that relationship, the Commission sought comment on whether it could take remedial action pursuant to Section 706. [37]

14. ***The Franchising Process.*** The record in this proceeding demonstrates that the franchising process differs significantly from locality to locality. In most states, franchising is conducted at the local level, affording counties and municipalities broad discretion in deciding whether to grant a franchise.[38]

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[35] *Id.* at 18590.

[36] Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

[37] *See USTA v. FCC*, 359 F.3d 554, 580, 583 (D.C. Cir. 2004). *See also* USTelecom Comments at 15; TIA Comments at 16-17.

[38] *See, e.g.*, MD. ANN. CODE art. 23A § 2(b)(13); OR. CONST. ART. I, § 21 (2005); COLO. REV. STAT. ANN. § 30-35-201 (West 2005). We also note that several states have adopted statutes governing the franchising process. For example, some states require public hearings or special elections. *See* League of Minnesota Cities ("LMC") Comments at 6-8, South Slope (continued)

Some counties and municipalities have cable ordinances that govern the structure of negotiations, while others may proceed on an applicant-by-applicant basis.[39] Where franchising negotiations are focused at the local level, some LFAs create formal or informal consortia to pool their resources and expedite competitive entry.[40]

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Comments at 6. Other states have laws limiting the range of issues that can be negotiated in a franchise. *See* Cablevision Comments at 12, LMC Comments at 15. As we discuss below, certain states have adopted new franchising laws that allow providers to apply for franchises through state franchising authorities ("SFAs"), and we note that lawmakers in those states adopted these new franchising laws to address the needs of the current marketplace. Furthermore, certain states have traditionally considered franchise applications at the state level. *See, e.g.*, HAW. REV. STAT. § 440G-4 (2006), CONN. GEN. STAT. ANN. § 16-331 (West 2006), VT. STAT. ANN. tit. 30, § 502 (2006). The record indicates that state level franchising may provide a practical solution to the problems that facilities-based entrants face when seeking to provide competitive services on a broader basis than county or municipal boundaries and seek to provide service in a significant number of franchise areas. *See, e.g.*, AT&T Reply at 21, 37, NTCA Comments at 10.

[39] *See, e.g.*, Mobile, Ala. Comments at 2 (discussing its Master Cable Services Regulatory Ordinance that was created to ensure all potential entrants were treated in a uniform manner); Ontario, Cal. Comments at 5-6 (discussing draft master ordinance that will ensure a "fair and equitable application process" for all new entrants).

[40] *See, e.g.*, MO-NATOA Comments at 8 ("some localities work together to franchise and manage rights-of-way"); MHRC
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15. To provide video services over a geographic area that encompasses more than one LFA, a prospective entrant must become familiar with all applicable regulations. This is a time-consuming and expensive process that has a chilling effect on competitors.[41] Verizon estimates, for example, that it will need 2,500-3,000 franchises in order to provide video services throughout its service area.[42] AT&T states that its Project Lightspeed deployment is projected to cover a geographic area that would encompass as many as 2,000 local franchise areas.[43] BellSouth estimates that there are approximately 1,500 LFAs within its service area.[44] Qwest's in-region territory covers a potential 5,389 LFAs.[45] While other companies are also considering competitive entry,[46] these estimates

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Comments at 1 (MHRC is a consolidated regulatory authority for six Oregon localities).

[41] *See, e.g.*, Verizon Comments at 27, Att. A, para. 10, 59-75; BellSouth Comments at 2, 11; Letter from Jeffrey S. Lanning, Associate General Counsel, USTelecom, to Marlene H. Dortch, Secretary, Federal Communications Commission at 17-18 (July 28, 2006) ("USTelecom *Ex Parte*").

[42] Verizon Comments at 27, Att. A, para. 10.

[43] AT&T Comments at 17.

[44] BellSouth Comments at 11.

[45] Qwest Comments at 14.

[46] *See* BSPA Comments at 1-2; Cavalier Telephone Comments at 2; South Slope Comments at 2; Cincinnati Bell Comments at 1; Hawaiian Telcom Comments at 1; Minnesota Telecom

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amply demonstrate the regulatory burden faced by competitors that seek to enter the market on a wide scale, a burden that is amplified when individual LFAs unreasonably refuse to grant competitive franchises.

16. A few states and municipalities recently have recognized the need for reform and have established expedited franchising processes for new entrants. Although these processes also vary greatly and thus are of limited help to new cable providers seeking to quickly enter the marketplace on a regional basis, they do provide more uniformity in the franchising process on an intrastate basis. These state level reforms appear to offer promise in assisting new entrants to more quickly begin offering consumers a competitive choice among cable providers. In 2005, the Texas legislature designated the Texas Public Utility Commission ("PUC") as the franchising authority for state-issued franchises, and required the PUC to issue a franchise within 17 business days after receipt of a completed application from an eligible applicant.[47] In 2006,

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Alliance Comments at 2 In addition to video services, many of these new entrants also intend to provide broadband services. *See, e.g.*, Verizon Comments at i; BSPA Comments at 1; Cavalier Telephone Comments at 2.

[47] TEX. UTIL. CODE ANN. §§ 66.001, 66.003. Holders of these franchises are required to pay franchise fees, comply with customer service standards, and provide the capacity for PEG access channels that a municipality has activated under the
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Indiana, Kansas, South Carolina, New Jersey, North Carolina, and California also passed legislation to streamline the franchising process by providing for expedited, state level grants of franchises.[48] Virginia, by contrast, did not establish statewide franchises but mandated uniform time frames for negotiations, public hearings, and ultimate franchise approval at the local level. In particular, a "certificated provider of telecommunications service" with existing authority to use public rights-of-way is authorized to provide video service within 75 days of filing a request to negotiate with each individual LFA.[49] Similarly, Michigan recently enacted legislation that streamlines the franchise application process, establishes a 30-day timeframe within which an LFA must make a decision, and eliminates build-out requirements.[50]

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incumbent cable operator's franchise agreement. *Id.* at §§ 66.005, 66.006, 66.008, 66.009, 66.014. Franchisees are not required to comply with any build-out requirements, but they are prohibited from denying service to any area based on the income level of that area. *Id.* at § 66.007.

[48] IND. CODE § 8-1-34-16 (2006); 2006 Kan. Sess. Laws 93 (codified at KAN. STAT. ANN. § 17-1902); S.C. CODE ANN. § 58-12-310 et seq. (2006); Assemb., No. 804, 212th Leg. (N.J. 2006); 2006 N.C. Sessions Laws 151 (to be codified 1/1/2007 at N.C. GEN STAT. ANN. § 66-351 (West 2006); CAL. PUB. UTIL. CODE § 401, et seq.;.

[49] VA. CODE ANN. § 15.2-2108.1:1 et seq.

[50] 2006 Mich. Pub. Acts 480.

17. In some states, however, franchise reform efforts launched in recent months have failed. For example, in Florida, bills that would have allowed competitive providers to enter the market with a permit from the Office of the Secretary of State, and contained no build-out or service delivery schedules, died in committee.[51] In Louisiana, the Governor vetoed a bill that would have created a state franchise structure, provided for automatic grant of an application 45 days after filing, and contained no build-out requirements.[52] In Maine, a bill that would have replaced municipal franchises with state franchises was withdrawn.[53] Finally, a Missouri bill that would have given the Public Service Commission the authority to grant franchises and would have prohibited local franchising died in committee. [54]

III. DISCUSSION

18. Based on the voluminous record in this proceeding, which includes comments filed by new entrants, incumbent cable operators, LFAs, consumer groups, and others, we conclude that the current operation of the franchising process can

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[51] S 1984, 2006 Sess. (Fla. 2006), HB 1199, 2006 Sess. (Fla. 2006).

[52] HB 699, 2006 Reg. Sess. (La. 2006).

[53] LR 2800, 2006 Leg., 2d. Reg. Sess. (Me. 2005).

[54] SB 816, 2006 Sess. (Mo. 2006).

constitute an unreasonable barrier to entry for potential cable competitors, and thus justifies Commission action. We find that we have authority under Section 621(a)(1) to address this problem by establishing limits on LFAs' ability to delay, condition, or otherwise "unreasonably refuse to award" competitive franchises. We find that we also have the authority to consider the goals of Section 706 in addressing this problem under Section 621(a)(1). We believe that, absent Commission action, deployment of competitive video services by new cable entrants will continue to be unreasonably delayed or, at worst, derailed. Accordingly, we adopt incremental measures directed to LFA-controlled franchising processes, as described in detail below. We anticipate that the rules and guidance we adopt today will facilitate and expedite entry of new cable competitors into the market for the delivery of multichannel video programming and thus encourage broadband deployment.

A. The Current Operation of the Franchising Process Unreasonably Interferes With Competitive Entry

19. Most communities in the United States lack cable competition, which would reduce cable rates and increase innovation and quality of service.[55] Although LFAs adduced evidence that

[55] *See Local Franchising NPRM*, 20 FCC Rcd at 18588.

they have granted some competitive franchises,[56] and competitors acknowledge that they have obtained some franchises,[57] the record includes only a few hundred examples of competitive franchises, many of which were obtained after months of unnecessary delay. In the vast majority of communities, cable competition simply does not exist.

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[56] For example, in Michigan, a number of LFAs have granted competitive franchises to local telecommunications companies. *See* Ada Township, *et al.*, Comments at 18-26. Vermont has granted franchises to competitive operators in Burlington, Newport, Berlin, Duxbury, Stowe, and Moretown. VPSB Comments at 5. Mt. Hood Cable Regulatory Commission ("MHRC"), a consolidated regulatory authority for six Oregon localities, has negotiated franchises with cable overbuilders, although those companies ultimately were unable to deploy service. MHRC Comments at 20-21. Similarly, the City of Los Angeles has granted two competitive franchises, but each of the competitors went out of business shortly after negotiating the franchise. City of Los Angeles Comments at 15; *see also* San Diego County, Cal. Comments at 4. Miami-Dade has granted 11 franchises to six providers, and currently is considering the application of another potential entrant. Miami-Dade Comments at 1-2. New Jersey has granted five competitive franchises, but only two ultimately provided service to customers. NJBPU Comments at 3. *See also, e.g.*, AT&T Reply Comments at 11-13; Chicago, Ill. Comments at 2-3; City of Charlotte and Mecklenburg County, N.C. Comments at 12-13; Henderson, Nev. Comments at 5.

[57] For example, Verizon has obtained franchises covering approximately 200 franchise areas. *See* http://newscenter.verizon.com/press-releases/verizon/2006/verizon-to-bring-western.html.

20. The dearth of competition is due, at least in part, to the franchising process.[58] The record demonstrates that the current operation of the franchising process unreasonably prevents or, at a minimum, unduly delays potential cable competitors from entering the MVPD market.[59] Numerous commenters have adduced evidence that the current operation of the franchising process constitutes an unreasonable barrier to entry. Regulatory restrictions and conditions on entry shield incumbents from competition and are associated with various economic inefficiencies, such as reduced innovation and distorted consumer choices.[60] We recognize that some LFAs have made reasonable efforts to facilitate competitive entry into the video programming market. We also recognize that recent state level reforms have the potential to streamline the process to a noteworthy degree. We find, though, that the current operation of the local franchising process often is a roadblock to achievement of the statutory goals of enhancing cable competition and broadband deployment.

21. Commenters have identified six factors that stand in the way of competitive entry. They are: (1) unreasonable delays by LFAs in acting on

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[58] Qwest Reply at 13-14; USTelecom *Ex Parte* at 17-18.

[59] Verizon Comments at 31-34; AT&T Reply at 22-23; BellSouth Comments at 10; Cavalier Telephone Comments at 1. *See also* Mercatus Center Comments at 39-43.

[60] *See, e.g.*, DOJ *Ex Parte* at 3

franchise applications; (2) unreasonable build-out requirements imposed by LFAs; (3) LFA demands unrelated to the franchising process; (4) confusion concerning the meaning and scope of franchise fee obligations; (5) unreasonable LFA demands for PEG channel capacity and construction of I-Nets; and (6) level-playing-field requirements set by LFAs. We address each factor below.

22. ***LFA Delays in Acting on Franchise Applications.*** The record demonstrates that unreasonable delays in the franchising process have obstructed and, in some cases, completely derailed attempts to deploy competitive video services. Many new entrants have been subjected to lengthy, costly, drawn-out negotiations that, in many cases, are still ongoing. The FTTH Council cited a report by an investment firm that, on average, the franchising process, as it currently operates, delays entry by 8-16 months.[61] The record generally supports that estimate. For example, Verizon had 113 franchise negotiations underway as of the end of March 2005. By the end of March 2006, LFAs had granted only 10 of those franchises. In other words, more than 90% of the negotiations were not completed within one year.[62] Verizon noted that delays are often caused

[61] FTTH Council Comments at 26.

[62] Verizon Reply Comments at 35. These figures do not include Verizon's franchise applications in Texas, which now authorizes statewide franchises. *See supra* para. 16.

by mandatory waiting periods.[63] BellSouth explained that negotiations took an average of 10 months for each of its 20 cable franchise agreements,[64] and that in one case, the negotiations took nearly three years.[65] AT&T claims that anti-competitive conditions, such as level-playing-field constraints and LFA demands regarding build-out, not only delay entry but can prevent it altogether.[66] BellSouth notes that absent such demands (in Georgia, for example), the company's applications were granted quickly.[67] Most of Ameritech's franchise negotiations likewise took a number of years.[68] New entrants other than the large incumbent local exchange carriers ("LECs")[69] also

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[63] Verizon Comments at 31-32.

[64] BellSouth Comments at 2.

[65] BellSouth Comments at 11. BellSouth's franchise in Cobb County, Ga. took approximately 32 months to obtain; its franchises in Davie, Fla. and Orange County, Fla. took 29 and 28 months, respectively. BellSouth Comments Decl. of Thompson T. Rawls, II, Exh. A.

[66] AT&T Reply at 6.

[67] BellSouth Reply at 7.

[68] AT&T Reply at 24.

[69] The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access. 47 U.S.C. § 153(26). For the purposes of Section 251 of the Communications Act, "the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange

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have experienced delays in the franchising process. NTCA provided an example of a small, competitive IPTV provider that is in ongoing negotiations that began more than one year ago.[70]

23. These delays are particularly unreasonable when, as is often the case, the applicant already has access to rights-of-way. One of the primary justifications for cable franchising is the LFA's need to regulate and receive compensation for the use of public rights-of-way.[71] However, when considering a franchise application from an entity that already has rights-of-way access, such as an incumbent LEC, an LFA need not and should not

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service in such area; and (B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association ...; or (B)(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member [of the exchange carrier association]." 47 U.S.C. § 251(h)(1). A competitive LEC is any LEC other than an incumbent LEC. A LEC will be treated as an ILEC if "(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph [251(h)](1); (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph [251(h)](1); and (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section." 47 U.S.C. § 251(h)(2).

[70] NTCA Comments at 4, 10.

[71] We note that certain franchising authorities may have existing authority to regulate LECs through state and local rights-of-way statutes and ordinances.

devote substantial attention to issues of rights-of-way management.[72] Moreover, in obtaining a certificate for public convenience and necessity from a state, a facilities-based provider generally has demonstrated its legal, technical, and financial fitness to be a provider of telecommunications services. Thus, an LFA need not spend a significant amount of time considering the fitness of such applicants to access public rights-of-way.

24. Delays in acting on franchise applications are especially onerous because franchise applications are rarely denied outright,[73] which would enable applicants to seek judicial review under Section 635.[74] Rather, negotiations are often

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[72] Recognizing this distinction, some states have enacted or proposed streamlined franchising procedures specifically tailored to entities with existing access to public rights-of-way. *See, e.g.*, VIRGINIA CODE ANN. § 15.2-2108.1:1 et seq.); HF-2647, 2006 Sess. (Iowa 2006) (this proposed legislation would grant franchises to all telephone providers authorized to use the right-of-way without any application or negotiation requirement). *See also* South Slope Comments at 11 (duplicative local franchising requirements imposed on a competitor with existing authority to occupy the rights-of-way are unjustified and constitute an unreasonable barrier to competitive video entry).

[73] *See* Northwest Suburbs Cable Communications Commission Comments at 5-6 (rare instance of competitive franchise denial).

[74] *See* 47 U.S.C. §§ 541(a)(1), 555(a).

drawn out over an extended period of time.[75] As a result, the record shows that numerous new entrants have accepted franchise terms they considered unreasonable in order to avoid further delay.[76] Others have filed lawsuits seeking a court order compelling the LFA to act, which entails additional delay, legal uncertainty, and great expense.[77]

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[75] *See* Verizon Comments at 30-34; Verizon Reply Comments at 2, 34-37; AT&T Reply Comments at 24; NTCA Comments at 4, 10.

[76] *See, e.g.,* USTelecom *Ex Parte* at 20 (Grand Rapids, Minnesota insisted that Paul Bunyan Telephone Cooperative provide fiber connections to every municipal building in the City, including a water treatment plant); Qwest *Ex Parte* at 7 (initially agreed to mandatory build-out provisions in certain situations); BellSouth Comments at 15-16 (in Dekalb County, Georgia, BellSouth makes PEG payments and I-Net support payments that drive total fees significantly above 5 percent of gross revenue).

[77] For example, in Maryland, Verizon filed suit against Montgomery County, seeking to invalidate some of the County's franchise rules, and requesting that the County be required to negotiate a franchise agreement, after the parties unsuccessfully attempted to negotiate a franchise beginning in May 2005. *See* Complaint, *Verizon Maryland, Inc. v. Montgomery County, Md.*, No. 06-01663-MJG (N.D. Md. June 29, 2006). The court denied Verizon's Motion for Preliminary Injunction in August, and ordered the parties to mediation. *See Verizon Maryland, Inc. v. Montgomery County, Md.*, Order, No. 06-01663-MJG (N.D. Md. August 8, 2006). Since then, the parties have negotiated a franchise agreement and the County held a public hearing on the draft franchise agreement. *See* Press Release, Montgomery County, Md., County Negotiates Cable Franchise Agreement with Verizon; Agreement Resolves Litigation, Provides Increased Competition for Cable Service

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Alternatively, some prospective entrants have walked away from unduly prolonged negotiations.[78] Moreover, delays provide the incumbent cable operator the opportunity to launch targeted marketing campaigns before the competitor's rollout,

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(Sept. 13, 2006) *available at* http://www.montgomerycountymd.gov/apps/News/press/PR_details.asp?PrID=2582. The County Council granted the negotiated franchise on November 28, 2006. Neil Adler, *Montgomery officials approve Verizon cable franchise*, WASHINGTON BUSINESS JOURNAL, Nov. 28, 2006, *available at* http://washington.bizjournals.com/washington/stories/2006/11/27/daily23.html. Qwest's experience with the City of Colorado Springs, Colorado is a particularly onerous example. *See* Letter from Melissa E. Newman, Vice President, Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 13, 2006), Letter from Kenneth L. Fellman, Counsel to Colorado Springs, Colorado, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 26, 2006). The city charter in Colorado Springs requires that a franchise agreement be approved by voters rather than a franchising authority. Despite the fact that the Communications Act and federal case law deem this approach unlawful, the Colorado Springs City Counsel would not grant a franchise absent a vote, and invited Qwest to file a "friendly lawsuit" (presumably at Qwest's expense) to invalidate that provision of the city charter. 47 U.S.C. §§ 522(10), 541, *Qwest Broadband Services, Inc. v. City of Boulder*, 151 F.Supp.2d 1236 (D. Colo. 2001), Letter from Melissa E. Newman, Vice President, Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission at 2 (June 13, 2006).

[78] *See* Qwest Comments at 9.

thus undermining a competitor's prospects for success.[79]

25. Despite this evidence, incumbent cable operators and LFAs nevertheless assert that new entrants can obtain and are obtaining franchises in a timely fashion,[80] and that delays are largely due to unreasonable behavior on the part of franchise applicants, not LFAs.[81] For example, Minnesota LFAs claim that they can grant a franchise in as little as eight weeks.[82] The record, however, shows that expeditious grants of competitive franchises are atypical. Most LFAs lack any temporal limits for consideration of franchise applications, and of those that have such limits, many set forth lengthy time frames. In localities without a time limit or with an unreasonable time limit, the delays caused by the current operation of the franchising process present

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[79] *See, e.g.*, South Slope Comments at 7.

[80] Cablevision Reply at 5; Orange County Comments at 5; Palm Beach County Comments at 3. *See* Comcast Comments at 8-9.

[81] Comcast Comments at 16; Cablevision Reply at 2. The incumbent cable operators accuse Verizon of making unreasonable demands through its model franchise. Verizon asserts that it submits a model franchise to begin negotiations because uniformity is necessary for its nationwide service deployment. Verizon Reply at 40. Verizon states that it is willing to negotiate and tailor the model franchise to each locality's needs. *Id.*

[82] LMC Comments at 18.

a significant barrier to entry.[83] For example, the cities of Chicago and Indianapolis acknowledged that, as currently operated, their franchising processes take one to three years, respectively.[84] Miami-Dade's cable ordinance permits the county to make a final decision on a cable franchise up to eight months after receiving a completed application, and the process may take longer if an applicant submits an incomplete application or amends its application.[85]

26. Incumbent cable operators and LFAs state that new entrants could gain rapid entry if the new entrants simply agreed to the same terms

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[83] We recognize that some franchising authorities move quickly, as a matter of law or policy. The record indicates that some LFAs have stated that they welcome competition to the incumbent cable operator, and actively facilitate such competition. *See, e.g.*, Manatee County, Fla. Comments at 4, Ada Township, *et al.* Comments at 16-27. For example, a consolidated franchising authority in Oregon negotiated and approved competitive franchises within 90 days. *See* Mt. Hood Cable Regulatory Commission Comments at 20. An advisory committee in Minnesota granted two competitive franchises in six months, after a statutorily imposed eight week notice and hearing period. *See* Southwest Suburban Cable Commission Comments at 5, 7. While we laud the prompt disposition of franchise applications in these particular areas, the record shows that these examples are atypical.

[84] *See* Chicago Comments at 4; Indianapolis Comments at 8.

[85] Miami-Dade Comments at 3.

applied to incumbent cable franchisees.[86] However, this is not a reasonable expectation generally, given that the circumstances surrounding competitive entry are considerably different than those in existence at the time incumbent cable operators obtained their franchises. Incumbent cable operators originally negotiated franchise agreements as a means of acquiring or maintaining a monopoly position.[87] In most instances, imposing the incumbent cable operator's terms and conditions on a new entrant would make entry prohibitively costly because the entrant cannot assume that it will quickly – or ever – amass the same number or percentage of subscribers that the incumbent cable operator captured.[88] The record demonstrates that requiring entry on the same terms as incumbent cable operators may thwart entry entirely or may threaten new entrants' chances of success once in the market.

27. Incumbent cable operators also suggest that delay is attributable to competitors that are not

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[86] *See, e.g.*, ANC Reply at 5-6. Commenters assert that Verizon's model agreement prevents LFAs from exercising control over rights-of-way, does not require Verizon to repair damage to municipal property due to construction, does not require service to all residents, and contains an "opt-out" provision that allows Verizon to abandon an area it does not find profitable. ANC Reply at 8-10.

[87] Verizon Reply at 38-40.

[88] Verizon Comments at 53.

really serious about entering the market, as demonstrated by their failure to file the thousands of franchise applications required for broad competitive entry.[89] We reject this explanation as inconsistent with both the record as well as common sense. Given the complexity and time-consuming nature of the current franchising process, it is patently unreasonable to expect any competitive entrant to file several thousand applications and negotiate several thousand franchising processes at once. Moreover, the incumbent LECs have made their plans to enter the video services market abundantly clear, and the evidence in the record demonstates their seriousness about doing so. For instance, they are investing billions of dollars to upgrade their networks to enable the provision of video services, expenditures that would make little sense if they were not planning to enter the video market.[90] Finally, the record also demonstrates that the obstacles posed by the current operation of the franchising process are so great that some

[89] Cablevision Comments at 3.

[90] *See* AT&T Comments at 14; Verizon Comments at 27. In addition to negotiating with LFAs, competitors also have lobbied for broad franchising reform. To be sure, when prospective entrants anticipate franchise reform may occur at the state level, there is evidence in the record they often have not sought franchises at the local level. *See* Fairfax County, Va. Comments at 4. Such tactics, however, do not indicate that prospective entrants are not serious about entering the market but rather represent a strategic judgment as to the best method of accomplishing that goal.

prospective entrants have shied away from the franchise process altogether.[91]

28. We also reject the argument by incumbent cable operators that delays in the franchising process are immaterial because competitive applicants are not ready to enter the market and frequently delay initiating service once they secure a franchise.[92] We find that lack of competition in the video market is not attributable to inertia on the part of competitors. Given the financial risk, uncertainty, and delay new entrants face when they apply for a competitive franchise, it is not surprising that they wait until they get franchise approval before taking all steps necessary to provide service.[93] The sooner a franchise is granted, the sooner an applicant can begin completing those steps. Consequently, shortening the franchising process will accelerate market entry. Moreover, the record shows that streamlining the franchising process can expedite market entry. For example, less than 30 days after Texas authorized statewide franchises, Verizon filed an application for a franchise with respect to 21 Texas communities

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[91] Qwest Comments at 9.

[92] NCTA Comments at 11; Comcast Reply at 16; Cablevision Reply at 9; City of Murrieta, Ca. Comments at 2.

[93] *See* Verizon Reply Comments at 37.

and was able to launch services in most of those communities within 45 days.[94]

29. Incumbent cable operators offer evidence from their experience in the renewal and transfer processes as support for their contention that the vast majority of LFAs operate in a reasonable and timely manner.[95] We find that incumbent cable operators' purported success in the franchising process is not a useful comparison in this case. Today's large MSOs obtained their current franchises by either renewing their preexisting agreements or by merging with and purchasing other incumbent cable franchisees with preexisting agreements. For two key reasons, their experiences in franchise transfers and renewals are not equivalent to those of new entrants seeking to obtain new franchises.[96] First, in the transfer or renewal context, delays in LFA consideration do not result in

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[94] Verizon Reply Comments at 37-38. *See also* NTCA Comments at 10-11 (citing Texas PUC testimony at February Commission Meeting held in Keller, Texas, which revealed that 15 companies have filed applications to serve 153 discrete communities in Texas since adoption of the new statewide franchising scheme).

[95] Comcast Comments at 17. For example, Comcast reports that when it acquired AT&T Broadband, it received timely approval from more than 1,800 LFAs within eight months. The company also states that it was well along in the process of receiving approvals from more than 1,500 LFAs for the Adelphia transaction.

[96] AT&T Reply at 22.

a bar to market entry. Second, in the transfer or renewal context, the LFA has a vested interest in preserving continuity of service for subscribers, and will act accordingly.

30. We also reject the claims by incumbent cable operators that the experiences of Ameritech, RCN, and other overbuilders[97] demonstrate that new entrants can and do obtain competitive franchises in a timely manner.[98] Charter claims that it secured franchises and upgraded its systems in a highly competitive market and that the incumbent LECs possess sufficient resources to do the same.[99] BellSouth notes, however, that Charter

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[97] The term "overbuild" describes the situation in which a second cable operator enters a local market in direct competition with an incumbent cable operator. In these markets, the second operator, or "overbuilder," lays wires in the same area as the incumbent, "overbuilding" the incumbent's plant, thereby giving consumers a choice between cable service providers. *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Prices for Basic Service, Cable Programming Services, and Equipment*, 20 FCC Rcd 2718, 2719 n.6 (2005).

[98] Cablevision Reply at 6. Comcast states that the overbuilder industry as a whole has more than 16 million households under active franchise and two million households under franchise in anticipation of future network build-outs. Comcast Comments at 5-6 (citing Broadband Service Providers Association Comments, MB Docket No. 05-255, at 7 (filed Sept. 19, 2005)).

[99] Charter Comments at 4. Specifically, Charter states that it entered the cable market in earnest in the late 1990s and has

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does not indicate a single instance in which it obtained a franchise through an initial negotiation, rather than a transfer.[100] Comcast argues that it faces competition from cable overbuilders in several markets.[101] The record is scant and inconsistent, however, with respect to overbuilder experiences in obtaining franchises, and thus does not provide reliable evidence. BellSouth also claims that, despite RCN's claims that the franchising process has worked in other proceedings, RCN previously has painted a less positive picture of the process and has called it a high barrier to entry.[102] Given these facts, we do not believe that the experiences cited by incumbent cable operators shed any significant light on the current operation of the franchising process with respect to competitive entrants.

31. ***Impact of Build-Out Requirements.*** The record shows that build-out issues are one of the

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spent the last five years investing billions of dollars to upgrade its cable systems and deploy advanced broadband services in more than 4,000 communities. Charter Comments at 2. During Charter's peak period of growth, it secured over 2,000 franchise transfers with LFAs and invested several billion dollars to upgrade systems, all while subject to significant competition from DBS. Charter Comments at 5.

[100] BellSouth Reply at 11.

[101] Comcast Comments at 4-5.

[102] BellSouth Reply at 13 (citing RCN's petition to deny the AT&T/Comcast merger application).

most contentious between LFAs and prospective new entrants, and that build-out requirements can greatly hinder the deployment of new video and broadband services. New and potential entrants commented extensively on the adverse impact of build-out requirements on their deployment plans.[103] Large incumbent LECs,[104] small and mid-sized incumbent LECs,[105] competitive LECs[106] and others view build-out requirements as the most significant obstacle to their plans to deploy competitive video

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[103] *See, e.g.*, Qwest Comments at 2; Cincinnati Bell Comments at 10-11; South Slope Comments at 7-9; NTCA Comments at 6-7; Cavalier Telephone Comments at 5; BSPA Comments at 6. *See also* Letter from Lawrence Spiwak, President, Phoenix Ctr. for Advanced Legal and Econ. Pub. Policy Studies, to Marlene Dortch, Secretary, Federal Communications Commission, at Att., *Phoenix Center Policy Paper Number 22: The Consumer Welfare Cost of Cable "Build-out" Rules*, at 3 ("build-out requirements are, on average, counterproductive and serve to *slow down* deployment of communications networks") (March 13, 2006) ("*Phoenix Center Build-Out Paper*").

[104] Qwest Comments at 2.

[105] Cincinnati Bell Comments at 10-11; South Slope Comments at 7-9; NTCA Comments at 6-7 (because the risk is great, the service provided by the new entrants must be guided by sound business principles; forcing a new entrant to build out an entire area before such action is financially justified is tantamount to forcing that entrant out of the video business); USTelecom *Ex Parte* at 8-11.

[106] Cavalier Telephone Comments at 5; BSPA Comments at 6 (a number of competitive franchises have been renegotiated or converted to OVS because the operator could not comply with unreasonable and uneconomic build-out requirements).

and broadband services. Similarly, consumer groups and the U.S. Department of Justice, Antitrust Division, urge the Commission to address this aspect of the current franchising process in order to speed competitive entry.[107]

32. The record demonstrates that build-out requirements can substantially reduce competitive entry.[108] Numerous commenters urge the Commission to prohibit LFAs from imposing any build-out requirements, and particularly universal build-out requirements.[109] They argue that imposition of such mandates, rather than resulting in the increased service throughout the franchise area that LFAs desire, will cause potential new entrants to simply refrain from entering the market at all.[110] They argue that even build-out provisions that do not require deployment throughout an entire

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[107] *See* MMTC Comments at 13-24; Consumers for Cable Choice Comments at 8; DOJ *Ex Parte* at 12-13, 15 (stating that build-out requirements lead to abandonment of entry, less efficient competition, or higher prices).

[108] *See, e.g.*, USTelecom Comments at 24 (citing example of Shenandoah Telecommunications, which cannot provide service to an entire county, and thus cannot provide service at all). *See also Phoenix Center Build-Out Paper* at 1, 3; DOJ *Ex Parte* at 12-13, 15.

[109] *See, e.g.*, Alcatel Comments at 10-11; AT&T Comments at 44; BellSouth Reply at 6; NTCA Comments at 6.

[110] *See, e.g.*, AT&T Comments at 44; Qwest Comments at 2; Ad Hoc Telecom Manufacturer Coalition Comments at 5; DOJ *Ex Parte* at 12-13, 15.

franchise area may prevent a prospective new entrant from offering service.[111]

33. The record contains numerous examples of build-out requirements at the local level that resulted in delayed entry, no entry, or failed

[111] Not all new entrants to the video market with existing telecommunications facilities are engaging in the upgrades to which Verizon and AT&T have committed. Cavalier Telephone, for example, is delivering IPTV over copper lines. Such delivery is limited, however, by ADSL-2 technology. Cavalier Telephone argues that it is unreasonable to require that it become capable of providing service to all households in a franchise area, which would require Cavalier Telephone to dig up rights-of-way and install duplicative facilities, which it has specifically sought to avoid doing by virtue of relying on the unbundled local loop. Cavalier Telephone Comments at 5. Similarly, Guadalupe Valley Telephone Cooperative (GVTC) could not deploy service in the face of differing build-out requirements across jurisdictions. *See* AT&T Reply at 37. Once Texas's new statewide franchising law went into effect, however, deployment became economically feasible for GVTC. *See id. See also Phoenix Center Build-out Paper at* 1, 3, 4 (build-out rules can significantly increase the costs of a new video entrant, and are actually counter-productive, serving primarily to deter new video entry and slow down deployment of communications networks); *Phoenix Center Redlining Paper* at 3 (even when build-out requirements are applied to new entrants altruistically, the requirements can be self-defeating and often erect insurmountable barriers to entry for new firms); BSPA at 4 (When a new network operator is forced to comply with a build-out that is equal to the existing incumbent cable footprint, it is forced to a build on a timeframe and in geographic areas where the cost to build and customer density will likely produce an economic loss for both network operators.), DOJ *Ex Parte* at 12-13, 15.

entry. A consortium of California communities demanded that Verizon build out to every household in each community before Verizon would be allowed to offer service to any community, even though large parts of the communities fell outside of Verizon's telephone service area.[112] Furthermore, Qwest has withdrawn franchise applications in eight communities due to build-out requirements.[113] In each case, Qwest determined that entering into a franchise agreement that mandates universal build-out would not be economically feasible.[114]

34. In many instances, level-playing-field provisions in local laws or franchise agreements compel LFAs to impose on competitors the same build-out requirements that apply to the incumbent cable operator.[115] Cable operators use threatened or actual litigation against LFAs to enforce level-playing-field requirements and have successfully delayed entry or driven would-be competitors out of town.[116] Even in the absence of level-playing-field

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[112] Verizon Comments at 41-42. Before the new statewide legislation, a Texas community had made the same request.

[113] *See* Qwest Comments at 9.

[114] *Id.* at 10.

[115] *See, e.g.*, GMTC Comments at 15; Philadelphia Reply at 2; FTTH Council at 33-34; US Telecom at 30-31; TCCFUI Comments at 11, 15.

[116] BSPA Comments at 5-6; BellSouth Comments at 44; Verizon Comments at 33-34 (noting that some LFAs are requesting indemnification from competitive applicants). For example,
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requirements, incumbent cable operators demand that LFAs impose comparable build-out requirements on competitors to increase the financial burden and risk for the new entrant.[117]

35. Build-out requirements can deter market entry because a new entrant generally must take customers from the incumbent cable operator, and thus must focus its efforts in areas where the take-rate will be sufficiently high to make economic sense. Because the second provider realistically cannot count on acquiring a share of the market similar to the incumbent's share, the second entrant cannot justify a large initial deployment.[118] Rather, a new entrant must begin offering service within a smaller area to determine whether it can reasonably ensure a return on its investment before expanding.[119] For example, Verizon has expressed significant concerns about deploying service in areas heavily populated with MDUs already under exclusive contract with another MVPD.[120] Due to

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Insight Communications filed suit against the City of Louisville and Knology. Although the LFA and Knology ultimately won, the delay resulted in Knology declining to enter that market. BSPA Comments at 5-6.

[117] *See* AT&T Comments at 51.

[118] Qwest Comments at 8.

[119] FTTH Council Comments at 33-34.

[120] Verizon Reply at 70-71.

the risk associated with entering the video market, forcing new entrants to agree up front to build out an entire franchise area too quickly may be tantamount to forcing them out of – or precluding their entry into – the business.[121]

36. In many cases, build-out requirements also adversely affect consumer welfare. DOJ noted that imposing uneconomical build-out requirements results in less efficient competition and the potential for higher prices.[122] Non-profit research organizations the Mercatus Center and the Phoenix Center argue that build-out requirements reduce

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[121] NTCA Comments at 7. *See also* DOJ *Ex Parte* at 12-13, 15; FTTH Council Comments at 29 (competitive entrants face a riskier investment than incumbents faced when they entered; moreover, incumbent firms have market power in the video market, their customers have little choice, and their costs can be spread over a large base, whereas new entrants do not have this same advantage). Although it is sometimes possible to renegotiate a build-out requirement if the new entrant cannot meet it, in many cases the LFA imposes substantial penalties for failure to meet a build-out requirement. *See* Anne Arundel County *et al.* Comments at 4, FTTH Council Comments at 34 (citing Grande Communications franchise agreement establishing penalty of $2,000 per day); Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, (Apr. 26, 2006), Attachment at 7 ("Qwest *Ex Parte*").

[122] *Id.* at 13.

consumer welfare.[123] Each conclude that build-out requirements imposed on competitive cable entrants only benefit an incumbent cable operator.[124] The Mercatus Center, citing data from the FCC and GAO indicating that customers with a choice of cable providers enjoy lower rates, argues that, to the extent that build-out requirements deter entry, they result in fewer customers having a choice of providers and a resulting reduction in rates.[125] The Phoenix Center study contends that build-out requirements deter entry and conflict with federal, state, and local government goals of rapid broadband deployment.[126] Another research organization, the American Consumer Institute (ACI), concluded that build-out requirements are inefficient: if a cable competitor initially serves only one neighborhood in a community, and a few consumers in this neighborhood benefit from the competition, total welfare in the community improves because no consumer was made worse and some consumers

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[123] Mercatus Center Comments at 39-41; *Phoenix Center Build-Out Paper* at 1; Letter from Stephen Pociask, President, American Consumer Institute, to Marlene Dortch, Secretary, Federal Communications Commission (March 3, 2006).

[124] *See id.*

[125] Mercatus Center Comments at 41. The Mercatus Center bases this assertion on the evidence that cable rate regulation does not affect cable rates significantly, which suggests that cable providers are not subsidizing less-profitable areas with the returns from more-profitable areas. *Id.*

[126] *Phoenix Center Build-Out Paper* at 1.

(those who can subscribe to the competitive service) were made better.[127] In comparison, requirements that deter competitive entry may make some consumers (those who would have been able to subscribe to the competitive service) worse off.[128] In many instances, placing build-out conditions on competitive entrants harms consumers and competition because it increases the cost of cable service.[129] Qwest commented that, in those communities it has not entered due to build-out requirements, consumers have been deprived of the likely benefit of lower prices as the result of competition from a second cable provider.[130] This claim is supported by the Commission's 2005 annual cable price survey, in which the Commission observed that average monthly cable rates varied markedly depending on the presence – and type – of MVPD competition in the local market. The greatest difference occurred where there was wireline overbuild competition, where average monthly cable

[127] ACI Comments at 7.

[128] AT&T Comments at 48 (citing Thomas Hazlett & George Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the "Level Playing Field" in Cable TV Franchising Statutes*, 3 BUSINESS AND POLITICS issue 1, at 25-26 (2001)).

[129] AT&T Comments at 48 (citing Thomas Hazlett & George Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the "Level Playing Field" in Cable TV Franchising Statutes*, 3 BUSINESS AND POLITICS issue 1, at 25-26 (2001)).

[130] Qwest Comments at 10.

rates were 20.6 percent lower than the average for markets deemed noncompetitive.[131]

37. For these reasons, we disagree with LFAs and incumbent cable operators who argue that unlimited local flexibility to impose build-out requirements, including universal build-out of a franchise area, is essential to promote competition in the delivery of video programming and ensure a choice in providers for every household.[132] In many cases, build-out requirements may have precisely the opposite effects – they deter competition and deny consumers a choice.

38. Although incumbent LECs already have telecommunications facilities deployed over large areas, build-out requirements may nonetheless be a formidable barrier to entry for them for two reasons. First, incumbent LECs must upgrade their existing plant to enable the provision of video service, which

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[131] *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket. No. 92-266, FCC 06-179, para. 12 (rel. Dec. 27, 2006) ("2005 Cable Price Survey"). *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2772-73 (2005) ("2005 Video Competition Report").

[132] State of Hawaii Reply Comments at 4-5; Ada Township, *et al* Comments at 8-9; Manatee County, Fla. Comments at 19; Burnsville/Eagan Reply Comments at 19-20; New Jersey Board of Public Utilities Comments at 11-12.

often costs billions of dollars. Second, as the Commission stated in the *Local Franchising NPRM*, the boundaries of the areas served by facilities-based providers of telephone and/or broadband services frequently do not coincide with the boundaries of the areas under the jurisdiction of the relevant LFAs.[133] In some cases, a potential new entrant's service area comprises only a portion of the area under the LFA's jurisdiction.[134] When LECs are required to build out where they have no existing plant, the business case for market entry is significantly weakened because their deployment costs are substantially increased. [135] In other cases, a potential new entrant's facilities

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[133] *Local Franchising NPRM,* 20 FCC Rcd at para. 618595.

[134] *See* NTCA Comments at 15; South Slope Comments at 8-9 (mandatory build-out of entire franchise areas unreasonably impedes competitive entry where entrants' proposed service area is not located entirely within an LFA-defined local franchise area).

[135] *See, e.g.*, FTTH Council Comments at 33-34; South Slope Comments at 8-9; NTCA Comments at 15; BellSouth Reply at 25. BellSouth has a franchise to serve unincorporated Cherokee County, Ga., but the geographic area of this franchise is much larger than the boundaries of BellSouth's wire center. *Id.* BellSouth faces a similar issue in Orange County, Fla. *Id.* *See also* Linda Haugsted, *Franchise War in Texas*, MULTICHANNEL NEWS, May 2, 2005 (noting that, although Verizon had negotiated successfully a cable franchise with the City of Keller, Texas, "it will not build out all of Keller: It only has telephone plant in 80% of the community. SBC serves the rest of the locality."). NTCA states that theoretically the incumbent LEC could extend its facilities, but to do so within another provider's incumbent LEC territory would require an
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may already cover most or all of the franchise area, but certain economic realities prevent or deter the provider from upgrading certain "wire center service areas" within its overall service area.[136] For example, some wire center service areas may encompass a disproportionate level of business locations or multi-dwelling units ("MDUs") with

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incumbent LEC to make a financially significant business decision, solely for purposes of providing video programming. *See* NTCA Comments at 15.

[136] *See* Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311 at 3 (filed May 3, 2006). In this *Order* we use "wire center service area" to mean the geographic area served by a wire center as defined in Part 51 of the Commission's rules, except wire centers that have no line-side functionality, such as switching units that exclusively interconnect trunks. See 47 C.F.R. § 51.5. *See also Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, 2586 (2005), para. 87 n.251 ("*Triennial Review Remand Order*") ("By 'wire center,' we mean any incumbent LEC switching office that terminates and aggregates loop facilities"). The Commission's rules define "wire center" to mean "the location of an incumbent LEC local switching facility containing one or more central offices as defined in Part 36 [of the Commission's rules]. The wire center boundaries define the area in which all customers served by a given wire center are located." 47 C.F.R. § 51.5. The term "wire center" is often used interchangeably with the term "central office." Technically, the wire center is the location where a LEC terminates subscriber local loops, along with the facilities necessary to maintain them.

MVPD exclusive contracts.[137] New entrants argue that the imposition of build-out requirements in either circumstance creates a disincentive for them to enter the marketplace.[138]

39. Incumbent cable operators assert that new entrants' claims are exaggerated, and that, in most cases, LEC facilities are coterminous with

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[137] New entrants also point out that some wire center service areas are low in population density (measured by homes per cable plant mile). The record suggests, however, that LFAs generally have not required franchisees to provide service in low-density areas. *See, e.g.*, Madison, WI Comments at 4 (limiting build-out to areas with 40 dwelling units per cable mile); Renton, WA Comments at 3 (limiting build-out to 35 dwelling units per mile); West Palm Beach, Fla. Comments at 11 (limiting build-out to areas with 20 homes per mile). Nevertheless, density is likely to be of greater concern to a new entrant than to an incumbent cable operator, because the new entrant has to lure customers from the incumbent cable operator, and therefore cannot count on serving as many of the customers in a cable plant mile.

[138] BSPA Comments at 5 (when the footprint of an existing system does not match the territory of an LFA, build-out requirements restrict the growth of competition that could be created by incremental expansion of existing networks into adjacent territories because the operator must have the financial means to build out the entire adjacent franchise area before commencing any build-out); NTCA Comments at 15 (requiring small, rural incumbent LECs to deploy service beyond their existing telephone service areas would prohibit some carriers from offering video services to any community, thereby preventing competition). *See also* DOJ *Ex Parte* at 12-13, 15.

municipal boundaries.[139] The evidence submitted by new entrants, however, convincingly shows that inconsistencies between the geographic boundaries of municipalities and the network footprints of telephone companies are commonplace.[140] The cable industry has adduced no contrary evidence. The fact that few LFAs argued that non-coterminous boundaries are a problem[141] is not sufficient to contradict the incumbent LECs' evidence.[142]

40. Based on the record as a whole, we find that build-out requirements imposed by LFAs can constitute unreasonable barriers to entry for competitive applicants. Indeed, the record indicates that because potential competitive entrants to the cable market may not be able to economically justify build-out of an entire local franchising area

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[139] *See* Cablevision Reply at 16-17; Charter Reply at 8.

[140] *See* BSPA Comments at 5; South Slope Comments at 8-9; NTCA Comments at 15.

[141] Comcast Reply at 21 (citing comments of NATOA and Torrance, Cal.).

[142] *Compare* Tele Atlas Wire Center Premium v10.1 (April 2006) Maps for Bergen County, NJ and Los Angeles, Ca. and surrounding areas *with* The BRIDGE Data Group CableBounds Maps for Bergen County, NJ and Los Angeles, Ca. and surrounding areas (filed by the Media Bureau), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518618170, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518618171.

immediately,[143] these requirements can have the effect of granting *de facto* exclusive franchises, in direct contravention of Section 621(a)(1)'s prohibition of exclusive cable franchises.[144]

41. Besides thwarting potential new entrants' deployment of video services and depriving consumers of reduced prices and increased choice,[145] build-out mandates imposed by LFAs also may directly contravene the goals of Section 706 of the Telecommunications Act of 1996, which requires the Commission to "remov[e] barriers to infrastructure investment" to encourage the deployment of broadband services "on a reasonable and timely basis."[146] We agree with AT&T that Section 706, in conjunction with Section 621(a)(1), requires us to prevent LFAs from adversely affecting the deployment of broadband services through cable regulation.[147]

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[143] *See* FTTH Council Comments at 32; NTCA Comments at 7; Qwest Comments at 2, 8; Verizon Comments at 39-40.

[144] 47 U.S.C. § 544(a)(1).

[145] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Twelfth Annual Report, FCC 06-11, at ¶ 41 (rel. Mar. 3, 2006) (noting that overbuild competition, when present, often leads to lower cable rates and higher quality service).

[146] Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

[147] AT&T Comments at 45. *See also infra* para. 63.

42. We do not find persuasive incumbent cable operators' claims that build-out should necessarily be required for new entrants into the video market because of certain obligations faced by cable operators in their deployment of voice services. To the extent cable operators believe they face undue regulatory obstacles to providing voice services, they should make that point in other proceedings, not here. In any event, commenters generally agree that the record indicates that the investment that a competitive cable provider must make to deploy video in a particular geographic area far outweighs the cost of the additional facilities that a cable operator must install to deploy voice service.[148]

43. ***LFA Demands Unrelated to the Provision of Video Services.*** Many commenters recounted franchise negotiation experiences in which LFAs made unreasonable demands unrelated to the provision of video services. Verizon, for example, described several communities that made unreasonable requests, such as the purchase of street lights, wiring for all houses of worship, the

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[148] *See* NTCA Comments at 7; Verizon Reply at 54-55; American Consumer Institute Comments at 7; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17142-17143 (2003) ("*Triennial Review Order*"); *See also* High Tech Broadband Coalition Comments at 4-5 (fiber-to-the-home deployment increased 5300 percent since the *Triennial Review Order*, due in large part to the elimination of barriers to entry in that Order).

installation of cell phone towers, cell phone subsidies for town employees, library parking at Verizon's facilities, connection of 220 traffic signals with fiber optics, and provision of free wireless broadband service in an area in which Verizon's subsidiary does not offer such service.[149] In Maryland, some

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[149] Verizon Comments at 57 & Attachment A at 16-17. The *Wall Street Journal* reported "[Tampa, Florida] City officials presented [Verizon] with a $13 million wish list, including money for an emergency communications network, digital editing equipment and video cameras to film a math-tutoring program for kids." Another community presented Verizon with "requests for seed money for wildflowers and a video hookup for Christmas celebrations." Dionne Searcey, *As Verizon Enters Cable Business, it Faces Local Static*, WALL ST. J., Oct. 28, 2005, at A1. *But see* Verizon Comments at 65, filed February 13, 2006 (stating that "one franchising authority in Florida demanded that Verizon meet the incumbent cable operator's cumulative payments for PEG, which would exceed $6 million over 15 years of Verizon's proposed franchise term. When Verizon rejected this demand, the LFA doubled its request, asking for a fee in excess of $13 million that it said would be used for both PEG support and the construction of a redundant institutional network."); Verizon Revised Comments, filed March 6, 2006 at 65 (amending the second sentence of their comments above, in response to a request from the City of Tampa, to state that "[w]hen Verizon rejected this demand and asked for an explanation, the LFA provided a summary 'needs assessment' in excess of $13 million for both PEG support."); Tampa Reply at 3-4 (noting that Verizon's errata "clarified that the City of Tampa has not demanded Verizon provide $13.5 million dollars as a condition of granting a cable television franchise," and calling the *Wall Street Journal* article assertions an "urban legend"); John Dunbar, *FCC's Cable TV Ruling Criticized*, ASSOCIATED PRESS, Jan. 29, 2007 (stating that "[The Tampa City Attorney] said Tampa gave Verizon a

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localities conditioned a franchise upon Verizon's agreement to make its data services subject to local customer service regulation.[150] AT&T provided examples of impediments that Ameritech New Media faced when it entered the market, including a request for a new recreation center and pool.[151] FTTH Council highlighted Grande Communications' experience in San Antonio, which required that Grande Communications make an up-front, $1 million franchise fee payment and fund a $50,000 scholarship with additional annual contributions of $7,200.[152] The record demonstrates that LFA demands unrelated to cable service typically are not counted toward the statutory 5 percent cap on franchise fees, but rather imposed on franchisees in addition to assessed franchise fees.[153] Based on this

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$13 million 'needs assessment' that was required by law in order to obtain contributions for equipment for public access and government channels" and also quoting the City Attorney saying that "it is possible the 'needs assessment' included video cameras to film shows such as the math class, but that there was never 'a specific quid pro quo.' Nor was anything like that mentioned in the franchise agreement.").

[150] Verizon Comments at 75.

[151] AT&T Comments at 24.

[152] FTTH Council Comments at 38.

[153] BSPA Comments at 8. BSPA argues that under the current franchising process, LFAs are able to bargain for capital payments to use on infrastructure needs when LFAs should use the capital to benefit consumers. BSPA claims that LFAs use
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record evidence, we are convinced that LFA requests for unreasonable concessions are not isolated, and that these requests impose undue burdens upon potential cable providers.

44. ***Assessment of Franchise Fees.*** The record establishes that unreasonable demands over franchise fee issues also contribute to delay in franchise negotiations at the local level and hinder competitive entry.[154] Fee issues include not only which franchise-related costs imposed on providers should be included within the 5 percent statutory franchise fee cap established in Section 622(b),[155] but also the proper calculation of franchise fees (*i.e.*, the revenue base from which the 5 percent is calculated). In Virginia, municipalities have requested large "acceptance fees" upon grant of a franchise, in addition to franchise fees.[156] Other LFAs have requested consultant and attorneys' fees.[157] Several Pennsylvania localities have requested franchise fees

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the capital to build and maintain I-Nets, city broadcasting facilities, and traffic light control systems. *Id.*

[154] *See, e.g.*, AT&T Comments at 64-67; BellSouth Comments at 38-40; Cavalier Telephone Comments at 7; FTTH Council Comments at 38-40. *But see* NATOA Reply at 27-35.

[155] 47 U.S.C. § 542(b).

[156] Verizon Comments at 59.

[157] *Id.* at 59-60.

based on cable and non-cable revenues.[158] Some commenters assert that an obligation to provide anything of value, including PEG costs, should apply toward the franchise fee obligation.[159]

45. The parties indicate that the lack of clarity with respect to assessment of franchise fees impedes deployment of new video programming facilities and services for three reasons. First, some LFAs make unreasonable demands regarding franchise fees as a condition of awarding a competitive franchise. Second, new entrants cannot reasonably determine the costs of entry in any particular community. Accordingly, they may delay or refrain from entering a market because the cost of entry is unclear and market viability cannot be projected.[160] Third, a new entrant must negotiate these terms prior to obtaining a franchise, which can take a considerable amount of time. Thus, unreasonable demands by some LFAs effectively creates an unreasonable barrier to entry.

46. ***PEG and I-Net Requirements.*** Negotiations over PEG and I-Nets also contribute to delays in the franchising process. In response to the *Local Franchising NPRM*, we received numerous comments asking for clarification of what

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[158] *Id.* at 63.

[159] AT&T Comments at 65-67; BellSouth Comments at 39.

[160] AT&T Reply at 31-32.

requirements LFAs reasonably may impose on franchisees to support PEG and I-Nets.[161] We also received comments suggesting that some LFAs are making unreasonable demands regarding PEG and I-Net support as a condition of awarding competitive franchises.[162] LFAs have demanded funding for PEG programming and facilities that exceeds their needs, and will not provide an accounting of where the money goes.[163] For example, one municipality in Florida requested $6 million for PEG facilities, and a Massachusetts community requested 10 PEG channels, when the incumbent cable operator only provides two.[164] Several commenters argued that it is unreasonable for an LFA to request a number of PEG channels from a new entrant that is greater than the number of channels that the community is using at the time the new entrant submits its franchise application.[165] The record indicates that LFAs also have made what commenters view as unreasonable institutional network requests, such as

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[161] *See, e.g.*, AT&T Comments at 67-70; BellSouth Comments at 39; Consumers for Cable Choice Comments at 8; FTTH Council Comments at 36-37, 66-67; Verizon Comments at 65-75. *But see* NATOA Reply at 30-42.

[162] FTTH Council Comments at 36; Verizon Comments at 65-66.

[163] Verizon Comments at 65.

[164] *Id.* at 65-66.

[165] Consumers for Cable Choice Comments at 8; Verizon Comments at 71.

free cell phones for employees, fiber optic service for traffic signals, and redundant fiber networks for public buildings.[166]

47. ***Level-Playing-Field Provisions.*** The record demonstrates that, in considering franchise applications, some LFAs are constrained by so-called "level-playing-field" provisions in local laws or incumbent cable operator franchise agreements.[167] Such provisions typically impose upon new entrants terms and conditions that are neither "more favorable" nor "less burdensome" than those to which existing franchisees are subject.[168] Some

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[166] Verizon Comments at 73.

[167] *See, e.g.*, Orange County, Fla. Comments at 3; Northwest Suburbs Cable Communications Commission Comments at 3; Winston-Salem, N.C. Comments at 5; Albuquerque, N.M. Comments at 3; Tulsa, Okla. Comments at 2-4; Enumclaw, Wash. Comments at 2; Madison, Wis. Comments at 5-6.

[168] *See Local Franchising NPRM*, 20 FCC Rcd at 18588. At least 10 states impose level-playing-field requirements upon LFAs, and those laws vary significantly in the subject matters they encompass. For example, compare Minnesota's requirement that a competitive entrant face similar build-out, franchise fee, and PEG requirements to Illinois's requirement that the competitive franchise be no more favorable with respect to the territorial extent of the franchise, system design, technical performance standards, construction schedules, bonds, standards for construction and installation of facilities, service to subscribers, PEG channels and programming, production assistance, liability and indemnification and franchise fees. MINN. STAT. ANN. § 238.08 (West 2006), 55 ILL. COMP. STAT. ANN. 5/5-1095(e)(4) (West 2006), *see also* ALA. CODE § 11-27-2 (2005), CONN. GEN. STAT. § 16-331(g) (2006),

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LFAs impose level-playing-field requirements on new entrants even without a statutory, regulatory, or contractual obligation to do so.[169] Minnesota's process allows incumbent cable operators to be active in a competitor's negotiation, and incumbent cable operators have challenged franchise grants when those incumbent cable operators believed that the LFA did not follow correct procedure.[170] According to BellSouth, the length of time for approval of its franchises was tied directly to level-playing-field constraints; absent such demands (in Georgia, for example), the company's applications were granted quickly.[171] NATOA contends, however, that although level-playing-field provisions sometimes can complicate the franchising process, they do not present unreasonable barriers to entry.[172] NATOA and LFAs argue that level-playing-field provisions serve important policy goals, such as ensuring a competitive environment and

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FLA. STAT. § 166.046(3) (2006), N.H. REV. STAT. ANN. § 53-C:3-b (2005), OKLA. STAT. ANN. tit. 11, § 22-107.1(B) (West 2006). S.D. CODIFIED LAWS § 9-35-27 (2005), TENN. CODE. ANN. § 7-59-203 (2005).

[169] *See* GMTC *et al.* Comments at 15; Pasadena, Ca. Comments at 10-11; Philadelphia, Pa. Comments at 7. *See also* AT&T Reply at 14.

[170] LMC Comments at 12-15.

[171] BellSouth Reply at 7.

[172] NATOA Reply at 43.

providing for an equitable distribution of services and obligations among all operators.[173]

48. The record demonstrates that local level-playing-field mandates can impose unreasonable and unnecessary requirements on competitive applicants.[174] As noted above, level-playing-field provisions enable incumbent cable operators to delay or prevent new entry by threatening to challenge any franchise that an LFA grants.[175] Comcast asserts that MSOs are well within their rights to insist that their legal and contractual rights are honored in the grant of a subsequent franchise.[176] The record demonstrates, however, that local level-playing-field requirements may require LFAs to impose obligations on new

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[173] *See, e.g.*, NATOA Reply at 44; Burnsville/Eagan Comments at 44; City of Philadelphia Reply at 2.

[174] *See, e.g.*, South Slope Comments at 7-8 (build-out); Verizon Comments at 60-61, 71 (PEG requirements); AT&T Comments at 67 (redundant facilities). *See also* FTTH Council Comments at 29-30 (quoting Hazlett & Ford study concluding that the result of level-playing-field laws "is that incumbents and [LFAs] can force entrants to incur sunk costs considerably in excess of what free market conditions would imply"). We note that, as described below, we do not address – and therefore do not preempt – state laws governing the franchising process including state level-playing-field mandates.

[175] *See supra* para. 34; *see also* DOJ *Ex Parte* at 15-16.

[176] Comcast Reply at 17-18 (citing Comcast's involvement in Verizon's Howard County, Maryland, franchise approval process).

entrants that directly contravene Section 621(a)(1)'s prohibition on unreasonable refusals to award a competitive franchise.[177] In most cases, incumbent cable operators entered into their franchise agreements in exchange for a monopoly over the provision of cable service.[178] Build-out requirements and other terms and conditions that may have been sensible under those circumstances can be unreasonable when applied to competitive entrants. NATOA's argument that level-playing-field requirements always serve to ensure a competitive environment and provide for an equitable distribution of services and obligations ignores that incumbent and competitive operators are not on the same footing. LFAs do not afford competitive providers the monopoly power and privileges that incumbents received when they agreed to their franchises, something that investors recognize.[179]

49. Moreover, competitive operators should not bear the consequences of an incumbent cable operator's choice to agree to any unreasonable franchise terms that an LFA may demand. And while the record is mixed as to whether level-playing-field mandates "assure that cable systems are responsive to the needs and interests of the local

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[177] Mercatus Center at 39-40; *Phoenix Center Competition Paper* at 7.

[178] *Id.*

[179] *See* BSPA Comments 4; USTelecom Comments at 51-53; Mercatus Comments at 39-40.

community,"[180] the more compelling evidence indicates that they do not because they prevent competition. Local level-playing-field provisions impose costs and risks sufficient to undermine the business plan for profitable entry in a given community, thereby undercutting the possibility of competition.[181]

50. ***Benefits of Cable Competition.*** We further agree with new entrants that reform of the operation of the franchise process is necessary and appropriate to achieve increased video competition and broadband deployment.[182] The record demonstrates that new cable competition reduces rates far more than competition from DBS. Specifically, the presence of a second cable operator in a market results in rates approximately 15 percent lower than in areas without competition – about $5 per month.[183] The magnitude of the rate

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[180] 47 U.S.C. § 521(2); *Id.*

[181] Mercatus Comments at 46.

[182] Verizon Reply at 5-8. *See also* DOJ *Ex Parte* at 1, 3.

[183] FTTH Council Comments at 13. *See also* U.S. General Accountability Office, *Subscriber Rates and Competition in the Cable Television Industry*, GAO-04-262T (Mar. 2004) ("[S]ubscribers in areas with a wire-based competitor had monthly cable rates about $5 lower, on average, than subscribers in similar areas without a wire-based competitor. Our interviews with cable operators also revealed that these companies generally lower rates and/or improve customer service where a wire-based competitor is present."); U.S.

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decreases caused by wireline cable competition is corroborated by the rates charged in Keller, Texas, where the price for Verizon's "Everything" package is 13 percent below that of the incumbent cable operator, and in Pinellas County, Florida, where Knology is the overbuilder and the incumbent cable

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General Accounting Office, GAO-04-8, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, Report to the Chairman, Committee on Commerce, Science and Transportation, U.S. Senate (2003) ("*2003 GAO Report*") at 3 (noting that cable rates are about 15 percent lower in markets where wireline competition is present), and at 10 (estimating that with an average monthly cable rate of approximately $34 that year, subscribers in areas with a wire-based competitor had monthly cable rates about $5 lower, on average, than subscribers in areas without such a competitor); U.S. General Accounting Office, GAO-03-130, *Issues in Providing Cable and Satellite Television Services*, Report to the Subcommittee on Antitrust, Competition, and Business and Consumer Rights, Committee on the Judiciary, U.S. Senate (2002) ("*2002 GAO Report*") at 9 (noting that in franchise areas with a second cable provider, cable prices are approximately 17 percent lower than in comparable areas without a second cable provider). *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Twelfth Annual Report, FCC 06-11, at para. 41 (rel. Mar. 3, 2006) and 2005 Cable Price Survey at paras. 2, 14 (noting that cable prices are 17 percent lower and decrease substantially when wireline cable competition is present).

operator's rates are $10-15 lower than in neighboring areas where it faces no competition.[184]

51. We also conclude that broadband deployment and video entry are "inextricably linked"[185] and that, because the current operation of the franchising process often presents an unreasonable barrier to entry for the provision of video services, it necessarily hampers deployment of broadband services.[186] The record demonstrates that broadband deployment is not profitable without the ability to compete with the bundled services that cable companies provide.[187] As the Phoenix Center explains, "the more potential revenues that the network can generate in a household, the more likely it is the network will be built to that household."[188]

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[184] FTTH Council Comments at 15-16, including chart and declaration.

[185] AT&T Comments at 12. *See also* BSPA Comments at 7; Freedomworks Comments at 15; Mercatus Center Comments at 34-35.

[186] Technology and Democracy Project Comments at 4.

[187] AT&T Comments at 12. The Government Accountability Office reached this same conclusion in its review of the video service market. *See Issues in Providing Cable and Satellite Television Services*, GAO 03-130 at 2 (2002).

[188] Letter from Lawrence Spiwak, President, Phoenix Ctr. for Advanced Legal and Econ. Pub. Policy Studies, to Marlene Dortch, Secretary, Federal Communications Commission, at Att., *Phoenix Center Policy Paper Number 23: The Impact of Video Service Regulation on the Construction of Broadband*

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DOJ's comments underscore that additional video competition will likely speed deployment of advanced broadband services to consumers.[189] Thus, although LFAs only oversee the provision of wireline-based video services, their regulatory actions can directly affect the provision of voice and data services, not just cable.[190] We find reasonable AT&T's assertion that carriers will not invest billions of dollars in network upgrades unless they are confident that LFAs will grant permission to offer video services quickly and without unreasonable difficulty.[191]

52. In sum, the current operation of the franchising process deters entry and thereby denies consumers choices.[192] Delays in the franchising process also hamper accelerated broadband deployment and investment in broadband facilities in direct contravention of the goals of Section 706,[193] the President's competitive broadband objectives,[194]

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Networks to Low-Income Households, pg 23 (March 13, 2006) ("*Phoenix Center Redlining Paper*").

189 DOJ *Ex Parte* at 3-4.

190 FTTH Council Comments at 4.

191 AT&T Comments at 15.

192 DOJ *Ex Parte* at 7-8.

193 Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

194 *See* The White House, *A New Generation of American Innovation*, 11-12 (April 2004), *available at*
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and our established broadband goals.[195] In addition, the economic effects of franchising delays can trickle down to manufacturing companies, which in some cases have lost business because potential new entrants would not purchase equipment without certainties that they could deploy their services.[196] We discuss below our authority to address these problems.

B. The Commission Has Authority to Adopt Rules to Implement Section 621(a)(1)

53. In the *Local Franchising NPRM*, the Commission tentatively concluded that it has the authority to adopt rules implementing Title VI of the Act,[197] including Section 621(a)(1).[198] The Commission sought comment on whether it has the authority to adopt rules or whether it is limited to

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http://www.whitehouse.gov/infocus/technology/economic_policy 200404/innovation.pdf.

[195] *See* Federal Communications Commission, *Strategic Plan 2006-2011* at 3 (2005).

[196] AT&T Reply at 9; Alcatel Comments at 1; Letter from Danielle Jafari, Director and Legal Counsel of Government Affairs, Telecommunications Industry Association, to Marlene Dortch, Secretary, Federal Communications Commission (March 9, 2006).

[197] *Local Franchising NPRM*, 20 FCC Rcd at 18589.

[198] 47 U.S.C. § 541(a)(1).

providing guidance.[199] Based on the record and governing legal principles, we affirm this tentative conclusion and find that the Commission has the authority to adopt rules to implement Title VI and, more specifically, Section 621(a)(1).

54. Congress delegated to the Commission the task of administering the Communications Act. As the Supreme Court has explained, the Commission serves "as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.'"[200] To that end, "[t]he Act grants the Commission broad responsibility to forge a rapid and efficient communications system, and broad authority to implement that responsibility."[201] Section 201(b) authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[202] "[T]he grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the

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[199] *Local Franchising NPRM*, 20 FCC Rcd at 18589.

[200] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167-68 (1968) (quotation omitted).

[201] *United Telegraph Workers, AFL-CIO v. FCC*, 436 F.2d 920, 923 (D.C. Cir. 1970) (citations and quotations omitted).

[202] 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.").

'provisions of this Act.'"[203] This grant of authority therefore necessarily includes Title VI of the Communications Act in general, and Section 621(a)(1) in particular. Other provisions in the Act reinforce the Commission's general rulemaking authority. Section 303(r), for example, states that "the Commission from time to time, as public convenience, interest, or necessity requires shall ... make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act...."[204] Section 4(i) states that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[205]

55. Section 2 of the Communications Act grants the Commission explicit jurisdiction over "cable services."[206] Moreover, as we explained in the *Local Franchising NPRM,* Congress specifically

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[203] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 (1999).

[204] *See also* 47 U.S.C. § 151 (the Commission "shall execute and enforce the provisions of this Act").

[205] 47 U.S.C. § 154(i).

[206] 47 U.S.C. § 152 ("The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in title VI.").

charged the Commission with the administration of the Cable Act, including Section 621.[207] In addition, federal courts have consistently upheld the Commission's authority in this area.[208]

56. Although several commenters disagreed with our tentative conclusion, none has persuaded us that the Commission lacks the authority to adopt rules to implement Section 621(a)(1). Incumbent cable operators and franchise authorities argue that the judicial review provisions in Sections 621(a)(1) and 635[209] indicate that Congress gave the courts exclusive jurisdiction to interpret and enforce

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[207] *Local Franchising NPRM*, 20 FCC Rcd at 18589.

[208] *See City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999) (finding that the FCC is charged by Congress with the administration of the Cable Act, including Section 621). *See also City of New York v. FCC*, 486 U.S. 57, 70 n.6 (1988) (explaining that Section 303 gives the FCC rulemaking power with respect to the Cable Act); *Nat'l Cable Television Ass'n v. FCC*, 33 F.3d 66, 70 (D.C. Cir. 1994) (upholding Commission finding that certain services are not subject to the franchise requirement in Section 621(b)(1)); *United Video v. FCC*, 890 F.2d 1173, 1183 (D.C. Cir. 1989) (denying petitions to review the Commission's syndicated exclusivity rules); *ACLU v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987) (upholding the Commission's interpretive rules regarding Section 621(a)(3)).

[209] 47 U.S.C. § 541(a)(1) ("[a]ny applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 635 for failure to comply with this subsection"). Section 635 sets forth the specific procedures for such judicial proceedings. 47 U.S.C. § 555.

Section 621(a)(1), including authority to decide what constitutes an unreasonable refusal to award a competitive cable franchise.[210] We find, however, that this argument reads far too much into the judicial review provisions. The mere existence of a judicial review provision in the Communications Act does not, by itself, strip the Commission of its otherwise undeniable rulemaking authority.[211] As a general matter, the fact that Congress provides a mechanism for judicial review to remedy a violation of a statutory provision does not deprive an agency of the authority to issue rules interpreting that statutory provision. Here, nothing in the statutory language or the legislative history suggests that by providing a judicial remedy, Congress intended to divest the Commission of the authority to adopt and enforce rules implementing Section 621.[212] In light

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[210] *See* NCTA Reply, at 11-13 (given the courts have concurrent jurisdiction to review many provisions of Title VI, Section 635(a) only has meaning if it is read to grant exclusive jurisdiction to the courts); Comcast Comments at 27-28 (Congress provided no role for the Commission in the franchising process); Comcast Reply at 27-28 (621(a)(1)'s "unreasonably refuse" language and court review are inextricably linked and thus enforcement authority over the franchising approval process lies with the courts); NATOA Comments at 7-8 (same).

[211] *See ACLU v. Texas*, 8?3 F.2d 1554, 1574 (D.C. Cir 1987) (recognizing that despite a reference to "court action" in Section 622(d), in the absence of more explicit guidance from Congress, the Commission has concurrent jurisdiction to take enforcement action with respect to franchise fee disputes).

[212] *See* BellSouth Reply at 35; USTelecom Reply at 14-16.

of the Commission's broad rulemaking authority under Section 201 and other provisions in the Act, the absence of a specific grant of rulemaking authority in Section 621 is "not peculiar."[213] Other provisions in the Act demonstrate that when Congress intended to grant exclusive jurisdiction, it said so in the legislation.[214] Here, however, neither Section 621(a)(1) nor Section 635 includes an

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[213] *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 385 (1999). In *Iowa Utilities Board*, the Supreme Court reviewed Commission rules implementing provisions of the Telecommunications Act of 1996. In particular, states challenged Commission rules implementing Section 252(c)(2), which provides, "a State commission shall ... establish any rates for interconnection, services, or network elements." 47 U.S.C. § 252(c)(2). Although this and other provisions in the 1996 Act entrusted the states with certain tasks, the Supreme Court held that "these assignments ... do not logically preclude the Commission's issuance of rules to guide the state-commission judgments." *Iowa Utilities Board*, 525 U.S. at 385. The same reasoning applies to the judicial review provisions in Sections 621(a)(1) and 635.

[214] *See, e.g.*, 47 U.S.C. § 255(f) ("The Commission shall have exclusive jurisdiction with respect to any complaint under this section."). We do not find persuasive commenters' argument that the only way to give Section 635(a) any meaning is to construe it as giving courts exclusive jurisdiction with regard to the three Title VI provisions enumerated in Section 635(a), *i.e.*, Sections 621(a)(1), 625, and 626. *See* NATOA Comments at 9. None of the cases cited by commenters support this proposition. Rather, they suggest that in the absence of an exclusivity provision in the statute, the Commission and courts share jurisdiction. *See, e.g.*, NATOA Comments at 9 (citing *ACLU v. FCC*, 823 F.2d 1554, 1573-75 (D.C. Cir. 1987)).

exclusivity provision, and we decline to read one into either provision.

57. In addition, we note that the judicial review provisions at issue here on their face apply only to a final decision by the franchising authority.[215] They do not provide for review of unreasonable refusals to award an additional franchise by withholding a final decision or insisting on unreasonable terms that an applicant properly refuses to accept. Nor do the judicial review provisions say anything about the broader range of practices governed by Section 621.[216]

58. We also reject the argument by some incumbent cable operators and franchise authorities that Section 621(a)(1) is unambiguous and contains no gaps in the statutory language that would give the Commission authority to regulate the franchising process.[217] We strongly disagree. Congress did not define the term "unreasonably

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[215] 47 U.S.C. § 541(a)(1) ("Any applicant whose application for a second franchise has been *denied by a final decision* of the franchising authority may appeal such *final decision* pursuant to the provisions of section 635 for failure to comply with this subsection") (emphasis added); 47 U.S.C. §555(a) ("Any cable operator adversely affected by any *final determination* made by a franchising authority under section 621(a)(1)" may commence an action in federal district court or State court) (emphasis added).

[216] *See* USTelecom Reply at 14.

[217] *See* Comcast Reply at 27.

refuse," and it is far from self-explanatory. The United States Court of Appeals for the District of Columbia Circuit has held that the term "unreasonable" is among the "ambiguous statutory terms" in the Communications Act, and that the "court owes substantial deference to the interpretation the Commission accords them."[218] We therefore find that Section 621(a)(1)'s requirement that an LFA "may not unreasonably refuse to award an additional competitive franchise" creates ambiguity that the Commission has the authority to resolve.[219] The possibility that a court, in reviewing a particular matter, may determine whether an LFA "unreasonably" denied a second franchise does not displace the Commission's authority to adopt rules generally interpreting what constitutes an "unreasonable refusal" under Section 621(a)(1).[220]

59. Some incumbent cable operators and franchise authorities argue that Section 621(a)(1)

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[218] *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) ("Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them.").

[219] 47 U.S.C. § 541(a)(1) (emphasis added).

[220] *See NCTA v. Brand X Internet Services*, 545 U.S. 967, --, 125 S. Ct. 2688, 2700-02 (2005) (where statute is ambiguous, and implementing agency's construction is reasonable, *Chevron* requires federal court to accept agency's construction of statute, even if agency's reading differs from prior judicial construction).

imposes no general duty of reasonableness on the LFA in connection with procedures for *awarding* a competitive franchise.[221] According to these commenters, the "unreasonably refuse to award" language in the first sentence in Section 621(a)(1) must be read in conjunction with the second sentence, which relates to the *denial* of a competitive franchise application.[222] Based on this, commenters claim that "unreasonably refuse to award" means "unreasonably *deny*" and, thus, Section 621(a)(1) is not applicable before a final decision is rendered.[223] We disagree. By concluding that the language "unreasonably refuse to award" means the same thing as "unreasonably deny," commenters violate the long-settled principle of statutory construction that each word in a statutory scheme must be given meaning.[224] We find that the better reading of the phrase "unreasonably refuse to award" is that Congress intended to cover LFA conduct beyond ultimate denials by final decision, such as situations where an LFA has unreasonably refused to award an additional franchise by withholding a final decision or by insisting on unreasonable terms that an

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[221] *See* NCTA Comments at 28-29; Comcast Reply at 31.

[222] *See* NCTA Comments at 29; Comcast Reply at 32.

[223] *See* NATOA Comments at 30-31; NCTA Comments at 28-29; Burnsville/Eagan Comments at 31-32; Comcast Reply at 32-33.

[224] *See Bailey v. United States*, 516 U.S. 137, 143-45 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.").

applicant refuses to accept.[225] While the judicial review provisions in Sections 621(a)(1) and 635 refer to a "final decision" or "final determination,"[226] the Commission's rulemaking authority under Section 621 is not constrained in the same manner. Instead, the Commission has the authority to address what constitutes an unreasonable refusal to award a franchise, and as stated above, a local franchising authority may unreasonably refuse to award a franchise through other routes than issuing a final decision or determination denying a franchise application. For all of these reasons, we conclude that the Commission may exercise its statutory authority to establish federal standards identifying those LFA-imposed terms and conditions that would

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[225] *See, e.g., Tribune Co. v. FCC,* 133 F.3d 61, 66 (D.C. Cir. 1998) (imposing an "intolerable" condition on the grant of a license application may be deemed a *de facto* denial of that license for purposes of the appeal provisions under § 402(b) of the Act, citing *Mobile Communications Corp. of America v. FCC,* 77 F.3d 1399 (D.C. Cir. 1996)). *See also* DOJ *Ex Parte* at 7 (stating that unnecessary delays, demands for goods and services unrelated to the provision of cable services, and imposition of build-out requirements are tantamount to a "refusal" to award an additional competitive franchise).

[226] 47 U.S.C. §§ 541(a), 555. *See also Puget Sound Energy, Inc. v. U.S.*, 310 F.3d 613, 624-25 (9th Cir. 2002) (for purposes of determining when power administration's rate determination becomes a "final action" under statutory judicial review provision, court will turn for guidance to general doctrine of finality in administrative law, which "is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury").

violate Section 621(a)(1) of the Communications Act.[227]

60. Incumbent cable operators and local franchise authorities also maintain that the legislative history of Section 621(a)(1) demonstrates that Congress reserved to LFAs the authority to determine what constitutes "reasonable" grounds for franchise denials, with oversight by the courts, and left no authority under Section 621(a)(1) for the Commission to issue rules or guidelines governing the franchise approval process.[228] Commenters point to the Conference Committee Report on the 1992 Amendments,[229] which adopted the Senate version of Section 621,[230] rather than the House version, which "contained five examples of circumstances under which it is reasonable for a franchising authority to deny a franchise."[231] We find commenters' reliance

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[227] *See* Qwest Reply at 10-11.

[228] *See* NCTA Comments at 22-23; Florida Municipalities Comments at 9-10.

[229] H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-1260.

[230] S. REP. NO. 102-92, at 185 (1991) (explaining that "[i]t shall not be considered unreasonable for purposes of this provision for local franchising authorities to deny the application of a potential competitor if it is technically infeasible. However, the Committee does not intend technical infeasibility to be the only justification for denying an additional franchise").

[231] H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-1260 (listing five examples of reasonable denials identified in the House

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on the legislative history to be misplaced. While the House may have initially considered adopting a categorical approach for determining what would constitute a "reasonable *denial*," Congress ultimately decided to forgo that approach and prohibit franchising authorities from unreasonably refusing to *award* an additional competitive franchise.[232] To be sure, commenters are correct to point out that Congress chose not to define in the Act the meaning of the phrase "unreasonably refuse to award." However, commenters' assertion that Congress therefore intended for this gap in the statute to be filled in by only LFAs and courts lacks any basis in law or logic. Rather, we believe that it is far more reasonable to assume, consistent with settled principles of administrative law, that Congress intended that the Commission, which is charged by

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amendment to include: (1) technical infeasibility; (2) failure of the applicant to assure that it will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; (3) failure of the applicant to assure that it will provide service throughout the entire franchise area within a reasonable period of time; (4) the award would interfere with the ability of the franchising authority to deny renewal of a franchise; and (5) failure to demonstrate financial, technical, or legal qualifications to provide cable service."); H.R. REP. NO. 102-628, at 90 (1992). *See* NCTA Comments at 22; Florida Municipalities Comments at 9-10.

[232] H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-1260.

Congress with the administration of Title VI,[233] to have the authority to do so. There is nothing in the statute or the legislative history to suggest that Congress intended to displace the Commission's explicit authority to interpret and enforce provisions in Title VI, including Section 621(a)(1).

61. The pro-competitive rules and guidance we adopt in this *Order* are consistent with Congressional intent. Section 601 states that Title VI is designed to "promote competition in cable communications."[234] In a report to Congress prepared pursuant to the 1984 Cable Act, the Commission concluded that in order "[t]o encourage more robust competition in the local video marketplace, the Congress should ... forbid local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service."[235] In response, Congress revised Section 621(a)(1) to prohibit a franchising authority from unreasonably refusing to award an additional competitive franchise.[236] The regulations

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[233] *See City of Chicago v. FCC*, 199 F.3d at 428. *See also AT&T Corp. v. Iowa Utilities Board*, 525 U.S. at 377-380.

[234] 47 U.S.C. § 521(6).

[235] *See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 4974 (1990).

[236] 47 U.S.C. § 541(a)(1). *See also* H.R. REP. NO. 102-628, at 47 (1992) (noting the Commission's recommendation that, in order to encourage competition, Congress should prevent LFAs from

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set forth herein give force to that restriction and vindicate the national policy goal of promoting competition in the video marketplace.

62. Our authority to adopt rules implementing Section 621(a)(1) is further supported by Section 706 of the Telecommunications Act of 1996, which directs the Commission to encourage broadband deployment by utilizing "measures that promote competition ... or other regulating methods that remove barriers to infrastructure investment."[237] The D.C. Circuit has found that the Commission has the authority to consider the goals of Section 706 when formulating regulations under

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unreasonably denying a franchise to potential competitors); *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442, 7469 (1994) (recognizing that "Congress incorporated the Commission's recommendation in the 1992 Cable Act by amending § 621(a)(1) of the Communications Act..."). The legislative history explained that the purpose of this abridgement of local government authority was to promote greater cable competition. S. REP. NO. 102-92, at 47 (1991) (the prohibition on local franchising authorities from unreasonably refusing to grant second franchises is based on evidence in the record that there are benefits from competition between two cable systems and the Committee's belief that LFAs should be encouraged to award second franchises).

[237] Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

the Act.[238] The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.[239] Thus, if the franchising process were allowed to slow competition in the video service market, that would decrease broadband infrastructure investment, which would not only affect video but other broadband services as well.[240] As the DOJ points out, potential gains from competition, such as expedited broadband deployment, are more likely to

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[238] *See USTA v. FCC*, 359 F.3d 554, 580, 583 (D.C. Cir. 2004); *see also* USTelecom Comments at 15; TIA Comments at 16.

[239] *See* Alcatel Comments at 5-6; USTelecom Comments at 6 (broadband growth is tied to bundled services; firm's perceived need to compete for "triple play" customers is the driving force for broadband investment); AT&T Comments at 39-40 (the local franchising process discourages broadband infrastructure investment that supports video along with other broadband services).

[240] *See* Ad Hoc Telcom Manufacturer Coalition Comments at 1-3 (the franchising process threatens to slow down incumbent LECs' capital expenditures, thereby slowing competition in the video service market and reducing output throughout the high-tech manufacturing industry); AT&T Reply at 31-32 (the lack of clear regulatory guidance is chilling investment because new entrants cannot gauge the cost of entry); BellSouth Comments at 20-22 (the current franchising process impedes the deployment of BellSouth's broadband network).

be realized without imposed restrictions or conditions on entry in the franchising process.[241]

63. We reject the argument by incumbent cable operators and LFAs that any rules adopted under Section 621(a)(1) could adversely affect the franchising process.[242] In particular, LFAs contend that cable service requirements must vary from jurisdiction to jurisdiction because cable franchises need to be "tailored to the needs and interests of the local community."[243] The Communications Act preserves a role for local jurisdictions in the franchise process. We do not believe that the rules we adopt today will hamper the franchising process. While local franchising authorities and potential new entrants have opposing viewpoints about the reasonableness of certain terms,[244] we received comments from both groups that agree that Commission guidance concerning factors that are "reasonable" will help to expedite the franchising

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[241] DOJ *Ex Parte* at 4.

[242] *See, e.g.*, Anne Arundel County *et al.* Comments at 15 (federal regulation would not allow each locality to tailor franchise terms to its specific needs); NCTA Comments at 23 (universal rules and standards cannot be tailored well enough to define what is reasonable; reasonableness must be reviewed on a case-by-case basis).

[243] NATOA Comments at 27 (quoting Section 601(2) of the Communications Act, 47 U.S.C. § 521(2)).

[244] *See, e.g.*, NATOA Reply at 43; Verizon Comments at 76-77 (disagreeing about the reasonableness of level playing fields).

process.[245] Therefore, we anticipate that our implementation of Section 621(a)(1) will aid new entrants, incumbent cable operators, and LFAs in understanding the bounds of local authority in considering competitive franchise applications.

64. In sum, we conclude that we have clear authority to interpret and implement the Cable Act, including the ambiguous phrase "unreasonably refuse to award" in Section 621(a)(1), to further the congressional imperatives to promote competition and broadband deployment. As discussed above, this authority is reinforced by Section 4(i) of the Communications Act, which gives us broad power to perform acts necessary to execute our functions, and the mandate in Section 706 of the Telecommunications Act of 1996 that we encourage broadband deployment through measures that promote competition.[246] We adopt the rules and regulations in this *Order* pursuant to that authority. We find that Section 621(a)(1) prohibits not only an LFA's ultimate unreasonable denial of a competitive franchise application, but also LFA procedures and conduct that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise, whether by (1) creating unreasonable delays in the process, or (2) imposing unreasonable regulatory roadblocks,

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[245] *See* Manatee County Comments at 15; Verizon Reply at 35.

[246] 47 U.S.C. § 154(i), Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

such that they effectively constitute an "unreasonable refusal to award an additional competitive franchise" within the meaning of Section 621(a)(1).[247]

C. Steps to Ensure that the Local Franchising Process Does Not Unreasonably Interfere with Competitive Cable Entry and Rapid Broadband Deployment

65. Commenters in this proceeding identified several specific issues regarding problems with the current operation of the franchising process. These include: (1) failure by LFAs to grant or deny franchises within reasonable time frames; (2) LFA requirements that a facilities-based new entrant build out its cable facilities beyond a reasonable service area; (3) certain LFA-mandated costs, fees, and other compensation and whether they must be counted toward the statutory 5 percent cap on franchise fees; (4) new entrants' obligations to provide support mandated by LFAs for PEG and I-Nets; and (5) facilities-based new entrants' obligations to comply with local consumer protection and customer service standards when the same facilities are used to provide other regulated services, such as telephony. We discuss each measure below.

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[247] *Id.*

1. Maximum Time Frame for Franchise Negotiations

66. As explained above,[248] the record demonstrates that, although the average time that elapses between application and grant of a franchise varies from locality to locality, unreasonable delays in the franchising process are commonplace and have hindered, and in some cases thwarted entirely, attempts to deploy competitive video services. The record is replete with examples of unreasonable delays in the franchising process,[249] which can indefinitely delay competitive entry and leave an applicant without recourse in violation of Section 621(a)(1)'s prohibition on unreasonable refusals to award a competitive franchise.[250]

67. We find that unreasonable delays in the franchising process deprive consumers of competitive video services, hamper accelerated broadband deployment, and can result in unreasonable refusals to award competitive franchises. Thus, it is necessary to establish reasonable time limits for LFAs to render a decision on a competitive applicant's franchise application.[251] We define below

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[248] *See supra* paras. 14-17, 22.

[249] *See Local Franchising NPRM,* 20 FCC Rcd at 18590 (quoting 47 U.S.C. § 541(a)(1)), FTTH Council Comments at 27, South Slope Comments at 13, Verizon Reply at 34-35.

[250] *See supra* paras. 22-30.

[251] 47 U.S.C. §§ 541(a)(1), 555.

the boundaries of a reasonable time period in which an LFA must render a decision, and we establish a remedy for applicants that do not receive a decision within the applicable time frame. We establish a maximum time frame of 90 days for entities with existing authority to access public rights-of-way, and six months for entities that do not have authority to access public rights-of-way. The deadline will be calculated from the date that the applicant files an application or other writing that includes the information described below. Failure of an LFA to act within the allotted time constitutes an unreasonable refusal to award the franchise under Section 621(a)(1), and the LFA at that time is deemed to have granted the entity's application on an interim basis, pursuant to which the applicant may begin providing service. Thereafter, the LFA and applicant may continue to negotiate the terms of the franchise, consistent with the guidance and rulings in this *Order*.

a. Time Limit

68. The record shows that the franchising process in some localities can drag on for years. We are concerned that without a defined time limit, the extended delays will continue, depriving consumers of cable competition and applicants of franchises. We thus consider the appropriate length of time that should be afforded LFAs in reaching a final decision on a competitive franchise application. Commenters suggest a wide range of time frames that may be reasonable for an LFA's consideration of a

competitive franchise application. TIA proposes that we adopt the time limit used in the Texas franchising legislation, which would allow a new entrant to obtain a franchise within 17 days of submitting an application.[252] Other commenters propose time limits ranging from 30 days to six months.[253] While NATOA in its comments opposes any time limit,[254] in February 2006 a NATOA representative told the Commission that the six-month time limit that California law imposes is reasonable.[255] Some commenters have suggested that a franchise applicant that holds an existing authorization to access rights-of-way (*e.g.*, a LEC) should be subject to a shorter time frame than other applicants. These commenters reason that deployment of video services requires an upgrade to existing facilities in the rights-of-way rather than construction of new facilities, and such applicants

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[252] *See* TIA Comments at 8, 18.

[253] *See* AT&T Comments at 77, Cavalier Telephone Comments at 4 (suggesting a 30-day time limit); BellSouth Comments at 36, NTCA Comments at 9, OPASTCO Reply at 4 (suggesting a 90-day time limit); Consumers for Cable Choice Comments at 9, Verizon Comments at 38, FTTH Council Comments at 60, State of Hawaii Reply at 3 (suggesting a 120-day time limit); Alliance for Public Technology Comments at 3 (suggesting a 180-day time limit); Qwest Comments at 26-27.

[254] NATOA Comments at 36-37, NATOA Reply at 21-23.

[255] Transcript of FCC Agenda Meeting and Panel Discussion at 38 (Feb. 10, 2006).

generally have demonstrated their fitness as a provider of communications services.[256]

69. In certain states, an SFA is responsible for all franchising decisions (*e.g.*, Hawaii, Connecticut, Vermont, Texas, Indiana, Kansas, South Carolina, and beginning January 1, 2007, California and North Carolina), and the majority of these states have established time frames within which those SFAs must make franchising decisions.[257] We are mindful, however, that states in which an LFA is the franchising authority, the LFA may be a small municipal entity with extremely limited resources.[258] Thus, it may not always be feasible for an LFA to carry out legitimate local

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[256] *See Local Franchising NPRM*, 20 FCC Rcd at 18591.

[257] *See* HAW. REV. STAT. § 440G-4 (2006); CONN. GEN. STAT. ANN. § 16-331 (West 2006); VT. STAT. ANN. tit. 30, § 502 (2006); TEX. UTIL. CODE ANN. § 66.003 (West 2006); IND. CODE § 8-1-34-16 (2006); 2006 KAN. SESS. LAWS Ch. 93 (West 2006); S.C. CODE ANN. § 58-12-05 (2006); N.C. GEN STAT. ANN. § 66-351; CAL. PUB. UTIL. CODE § 401, et seq. We note that our *Order* does not affect these franchising decisions.

[258] We note that a number of other states in addition to Texas have adopted or are considering statewide franchising in order to speed competitive entry. *See, e.g.*, IND. CODE § 8-1-34-16 (2006); VA. CODE ANN. § 15.2-2108.1:1 et seq. (2006); SB-816, 2006 Sess. (Mo. 2006). Nothing in our discussion here is intended to preempt the actions of any states. The time limit we adopt herein is a ceiling beyond which LFA delay in processing a franchise application becomes unreasonable. To the extent that states and/or municipalities wish to adopt shorter time limits, they remain free to do so.

policy objectives permitted by the Act and appropriate state or local law within an extremely short time frame. We therefore seek to establish a time limit that balances the reasonable needs of the LFA with the needs of the public for greater video service competition and broadband deployment. As set out in detail below, we believe that it is appropriate to provide rules to guide LFAs that retain ultimate decision-making power over franchise decisions.

70. As a preliminary matter, we find that a franchise applicant that holds an existing authorization to access rights-of-way should be subject to a shorter time frame for review than other applicants. First, one of the primary justifications for cable franchising is the locality's need to regulate and receive compensation for the use of public rights-of-way.[259] In considering an application for a cable franchise by an entity that already has rights-of-way access, however, an LFA need not devote substantial attention to issues of rights-of-way management.[260] Second, in obtaining a certificate

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[259] NATOA Comments at 38-39; Ada Township Comments at 11-14; TCCFUI Reply Comments at 18.

[260] Recognizing this distinction, some states have created streamlined franchising procedures specifically tailored to entities with existing access to public rights-of-way. *See, e.g.*, VIRGINIA CODE ANN. § 15.2-2108.1:1 et seq.); HF-2647, 2006 Sess. (Iowa 2006) (this proposed legislation would grant franchises to all telephone providers authorized to use the right-of-way without any application or negotiation (continued)

for public convenience and necessity from a state, a facilities-based provider generally has demonstrated its legal, technical, and financial fitness to be a provider of telecommunications services. Thus, an LFA need not spend a significant amount of time considering the fitness of such applicants to access public rights-of-way. NATOA and its members concede that the authority to occupy the right-of-way has an effect on the review of the financial, technical, and legal merits of the application, and eases right-of-way management burdens.[261] We thus find that a time limit is particularly appropriate for an applicant that already possesses authority to deploy telecommunications infrastructure in the public rights-of-way.[262] We further agree with AT&T that entities with existing authority to access rights-of-way should be entitled to an expedited process, and that lengthy consideration of franchise applications made by such entities would be

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requirement). *See also* South Slope Comments at 11 (duplicative local franchising requirements imposed on a competitor with existing authority to occupy the rights-of-way are unjustified and constitute an unreasonable barrier to competitive video entry).

261 *See* NATOA Comments at 38-39. Although NATOA contends that an applicant's authority to occupy the rights-of-way would not affect the length of the negotiations regarding PEG requirements, franchise fees, or build-out, we clarify the law concerning those issues below to minimize further disputes and delays.

262 Ad Hoc Telecom Manufacturers Comments at 6.

unreasonable.[263] Specifically, we find that 90 days provides LFAs ample time to review and negotiate a franchise agreement with applicants that have access to rights-of-way.[264]

71. Based on our examination of the record, we believe that a time limit of 90 days for those applicants that have access to rights-of-way strikes the appropriate balance between the goals of facilitating competitive entry into the video marketplace and ensuring that franchising authorities have sufficient time to fulfill their

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[263] AT&T argues that an entity authorized to occupy a right-of-way should simply complete a short-form application and agree to general cable franchise requirements such as franchise fees and PEG capacity, and that the right-of-way holder should receive a franchise within one month of filing the short-form application. *See* AT&T Comments at 74.

[264] *See* BellSouth Comments at 36; Ada Township, *et al.* Comments at 23; LMC Comments at 18; Hawaiian Telecom Comments at 7-8 (recommending a time frame of 90 days from the filing of the application). Several state legislators agree that an applicant's existing authority to occupy the right-of-way lightens the administrative load, and enacted or proposed similar measures to streamline the franchising process for entities that hold the authority. *See* VIRGINIA CODE ANN. § 15.2-2108.21; HF-2647, 2006 Sess. (Iowa 2006) (this proposed legislation would grant franchises to all telephone providers authorized to use the right-of-way without any application or negotiation requirement). We assume generally that state and local regulators are sufficiently empowered to deal with any public safety or aesthetic issues that may arise by virtue of deployment of new video-related equipment by applicants already authorized to use the rights-of way.

responsibilities. In this vein, we note that 90 days is a considerably longer time frame than that suggested by some commenters, such as TIA.[265] Additionally, we recognize that the Communications Act gives an LFA 120 days to make a final decision on a cable operator's request to modify a franchise.[266] We believe that the record supports an even shorter time here because the costs associated with delay are much greater with respect to entry. When an incumbent cable franchisee requests a modification, consumers are not deprived of service while an LFA deliberates. Here, delay by an individual LFA deprives consumers of the benefits of cable competition.[267] An LFA should be able to negotiate a franchise with a familiar applicant that is already authorized to occupy the right-of-way in less than 120 days. The list of legitimate issues to be negotiated is short,[268] and we narrow those issues considerably in this *Order*. We therefore impose a deadline of 90 days for an LFA to reach a final decision on a competitive franchise application

[265] *See* TIA Comments at 8-9 (a time frame of 17 business days, as set forth in the Texas statute, "provides ample time to negotiate an agreement reflecting the requirements of Section 621"); AT&T Comments at 75, 78-79. *See also supra* paras. 17, 27.

[266] *See* 47 U.S.C. § 545.

[267] Verizon Comments at 36-37.

[268] Verizon Reply Comments at 43 n.69.

submitted by those applicants authorized to occupy rights-of-way within the franchise area.

72. For other applicants, we believe that six months affords a reasonable amount of time to negotiate with an entity that is not already authorized to occupy the right-of-way, as an LFA will need to evaluate the entity's legal, financial, and technical capabilities in addition to generally considering the applicant's fitness to be a communications provider over the rights-of-way. Commenters have presented substantial evidence that six months provides LFAs sufficient time to review an applicant's proposal, negotiate acceptable terms, and award or deny a competitive franchise.[269] We are persuaded by the record that a six-month period will allow sufficient time for review. Given that LFAs must act on modification applications within the 120-day limit set by the Communications Act, we believe affording an additional two months – *i.e.*, a six-month review period – will provide LFAs ample time to conduct negotiations with an entity new to the franchise area.

73. Failure of an LFA to act within these time frames is unreasonable and constitutes a

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[269] *See* Cablevision Comments at 10-12; GMTC Comments at 3, 6-8; State of Hawaii Reply at 3; Mt. Hood Cable Regulatory Commission Comments at 20; NJBPU Comments at 5; Southwest Suburban Cable Commission Comments at 7. *See also* Fairfax County, Va. Comments at 4-7 (formal negotiations began April 1, 2005, franchise granted Oct. 1, 2005).

refusal to award a competitive franchise. Consistent with other time limits that the Communications Act and our rules impose,[270] a franchising authority and a competitive applicant may extend these limits if both parties agree to an extension of time. We further note that an LFA may engage in franchise review activities that are not prohibited by the Communications Act or our rules, such as multiple levels of review or holding a public hearing,[271] provided that a final decision is made within the time period established under this *Order*.

b. Commencement of the Time Period for Negotiations

74. The record demonstrates that there is no universally accepted event that "starts the clock" for purposes of calculating the length of franchise negotiations between LFAs and new entrants.[272] Accordingly, we find it necessary to delineate the point at which such calculation should begin. Few commenters offer specific suggestions on what event should open the time period for franchise negotiations. Qwest contends that the period for negotiations should commence once an applicant

[270] *See, e.g.*, 47 U.S.C. § 537, 47 C.F.R. § 76.502(c).

[271] *See* Southwest Suburban Cable Commission Comments at 7.

[272] *See supra* paras. 14-17.

files an application.[273] On the other hand, Verizon argues that the clock must start before an applicant files a formal application because significant negotiations often take place before a formal filing.[274] Specifically, the company advocates starting the clock when the applicant initiates negotiations with the LFA,[275] which could be documented informally between the applicant and the LFA or with a formal Commission filing for evidentiary purposes.

75. We will calculate the deadline from the date that the applicant first files certain requisite information in writing with the LFA. This filing must meet any applicable state or local requirements, including any state or local laws that specify the contents of a franchise application and payment of a reasonable application fee in jurisdictions where such fee is required. [276] This application, whether formal or informal, must at a minimum contain: (1) the applicant's name; (2) the names of the applicant's officers and directors; (3) the applicant's business address; (4) the name and

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[273] *See* Qwest Reply at 2 (establish a requirement that an LFA "must act on a franchise application within six months of filing").

[274] *See* Verizon Reply at 37; Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene Dortch, Secretary, Federal Communications Commission at 1 (April 21, 2006).

[275] *Id.*

[276] *See infra* paras. 99-104.

contact information of the applicant's contact; (5) a description of the geographic area that the applicant proposes to serve; (6) the applicant's proposed PEG channel capacity and capital support; (7) the requested term of the agreement; (8) whether the applicant holds an existing authorization to access the community's public rights-of-way; and (9) the amount of the franchise fee the applicant agrees to pay (consistent with the Communications Act and the standards set forth herein). Any requirement the LFA imposes on the applicant to negotiate or engage in any regulatory or administrative processes before the applicant files the requisite information is *per se* unreasonable and preempted by this *Order*. Such a requirement would delay competitive entry by undermining the efficacy of the time limits adopted in this *Order* and would not serve any legitimate purpose. At their discretion, applicants may choose to engage in informal negotiations before filing an application. These informal negotiations do not apply to the deadline, however; we will calculate the deadline from the date that the applicant first files its application with an LFA. For purposes of any disputes that may arise, the applicant will have the burden of proving that it filed the requisite information or, where required, the application with the LFA, by producing either a receipt-stamped copy of the filing or a certified mail return receipt indicating receipt of the required documentation. We believe that adoption of a time limit with a specific starting point will ensure that the franchising process will not be unduly delayed by

pre-filing requirements, will increase applicants' incentive to begin negotiating in earnest at an earlier stage of the process, and will encourage both LFAs and applicants to reach agreement within the specified time frame. We note that an LFA may toll the running of the 90-day or six-month time period if it has requested information from the franchise applicant and is waiting for such information. Once the information is received by the LFA, the time period would automatically begin to run again.

c. Remedy for Failure to Negotiate a Franchise Within the Time Limit

76. Finally, we consider what remedy or remedies may be appropriate in the event that an LFA and franchise applicant are unable to reach agreement within the 90-day or six-month time frame. Section 635 of the Communications Act provides a specific remedy for an applicant who believes that an LFA unreasonably denied its application containing the requisite information within the applicable time frame. Here, we establish a remedy in the event an LFA does not grant or deny a franchise application by the deadline. In selecting this remedy, we seek to provide a meaningful incentive for local franchising authorities to abide by the deadlines contained in this *Order* while at the same time maintaining LFAs' authority to manage rights-of-way, collect franchise fees, and address other legitimate franchise concerns.

77. In the event that an LFA fails to grant or deny an application by the deadline set by the Commission, Verizon urges the Commission to temporarily authorize the applicant to provide video service.[277] In general, we agree with this proposed remedy. In order to encourage franchising authorities to reach a final decision on a competitive application within the applicable time frame set forth in this *Order*, a failure to abide by the Commission's deadline must bring with it meaningful consequences. Additionally, we do not believe that a sufficient remedy for an LFA's inaction on an application is the creation of a remedial process, such as arbitration, that will result in even further delay. We also decline to agree to NATOA's suggestion that an applicant should be awarded a franchise identical to that held by the incumbent cable operator. This suggestion is impractical for the same reasons that we find local level-playing-field requirements are preempted.[278] Therefore, if an LFA has not made a final decision within the time limits we adopt in this *Order*, the

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[277] *See* Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene Dortch, Secretary, Federal Communications Commission at 1 (May 3, 2006).

[278] *See infra* para. 138. If new entrants were required to adopt the same franchises as incumbents, the new entrants would be forced to accept terms that violate Section 621(a)(1)'s prohibition on unreasonable refusals to grant franchises. *See* Mercatus Center at 39-40; Phoenix Center Competition Paper at 7.

LFA will be deemed to have granted the applicant an interim franchise based on the terms proposed in the application. This interim franchise will remain in effect only until the LFA takes final action on the application. We believe this approach is preferable to having the Commission itself provide interim franchises to applicants because a "deemed grant" will begin the process of developing a working relationship between the competitive applicant and the franchising authority, which will be helpful in the event that a negotiated franchise is ultimately approved.

78. The Commission has authority to deem a franchise application "granted" on an interim basis. As noted above, the Commission has broad authority to adopt rules to implement Title VI and, specifically, Section 621(a)(1) of the Communications Act.[279] As the Supreme Court has explained, the Commission serves "as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.'"[280] Section 201(b) authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[281] "[T]he grant in § 201(b)

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[279] *See supra* Section III.B.

[280] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167-68 (1968) (citations omitted).

[281] 47 U.S.C. § 201(b). *See also* 47 U.S.C. §§ 151, 154(i), 303(r).

means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act.'"[282] Section 2 of the Communications Act grants the Commission explicit jurisdiction over "cable services."[283] Moreover, Congress specifically charged the Commission with the administration of the Cable Act, including Section 621, and federal courts have consistently upheld the Commission's authority in this area.[284]

79. The Commission has previously granted franchise applicants temporary authority to operate in local areas. In the early 1970s, the Commission required every cable operator to obtain a federal certificate of compliance from the Commission before it could "commence operations."[285] In effect, the Commission acted as a co-franchising authority – requiring both an FCC certificate and a local franchise (granted pursuant to detailed Commission guidance and oversight) prior to the provision of services.[286] As the Commission noted, "[a]lthough we

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[282] *AT&T Corp. v. Iowa Utilites Board,* 525 U.S. 366, 378 (1999).

[283] 47 U.S.C. § 152.

[284] *See supra* note 208.

[285] Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community *Antenna Television Systems*, 36 F.C.C.2d 143, ¶ 178 (1972).

[286] The Commission ended the certificate requirement and ceded additional authority to state and local governments in the late 1970s, but only for pragmatic reasons. *See, e.g.*, Report

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have determined that local authorities ought to have the widest scope in franchising cable operators, *the final responsibility is ours.*"[287] And the Commission granted interim franchises for cable services in areas where there was no other franchising authority.[288]

80. We note that the deemed grant approach is consistent with other federal regulations designed to address inaction on the part of a State decision maker.[289] In addition, this approach does

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and Order, 66 F.C.C.2d 380, ¶¶ 33, 37 (1977); Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 71 F.C.C.2d 569, ¶ 7 (1979) (withdrawing aspects of Commission franchising participation, but only "as long as the actions taken at the local level will not undermine important and overriding federal interests").

[287] *Teleprompter Cable Sys.*, 52 F.C.C.2d 1263, ¶ 9 (1975) (emphasis added).

[288] See, e.g., Cable Television Reconsideration Order, 36 F.C.C.2d 326, ¶ 116 (1972); Sun Valley Cable Communications (Sun City, Arizona), 39 F.C.C.2d 105 (1973); Mahoning Valley Cablevision, Inc. (Liberty Township, Ohio), 39 F.C.C.2d 939 (1973).

[289] *See, e.g.*, 40 C.F.R. 141.716(a) (watershed control plans that are submitted to a state and not acted upon by the regulatory deadline are "considered approved" until the state subsequently withdraws such approval.); 42 C.F.R. 438.56(e)(2) (an application to disenroll from a Medicaid managed care plan shall be "considered approved" if not acted on by a state agency within the regulatory deadline). *See also* 47 U.S.C. § 160(c) (petition for forbearance "deemed granted" if Commission fails to deny within the regulatory deadline).

not raise any special legal concerns about impinging on state or local authority. The Act plainly gives federal courts authority to review decisions made pursuant to Section 621(a)(1).[290] As the Supreme Court observed in *Iowa Utilities Board*, "This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew. To be sure, the FCC's lines can be even more restrictive than those drawn by the courts – but it is hard to spark a passionate 'States' rights' debate over that detail."[291]

81. We anticipate that a deemed grant will be the exception rather than the rule because LFAs will generally comply with the Commission's rules and either accept or reject applications within the applicable time frame. However, in the rare instance that a local franchising authority unreasonably delays acting on an application and a deemed grant therefore occurs, we encourage the parties to continue to negotiate and attempt to reach a franchise agreement following expiration of the formal time limit. Each party will have a strong incentive to negotiate sincerely: LFAs will want to ensure that their constituents continue to receive the benefits of competition and cable providers will want to protect the investments they have made in

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[290] *See* 47 U.S.C. § 555.

[291] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

deploying their systems. If the LFA ultimately acts to deny the franchise after the deadline, the applicant may appeal such denial pursuant to Section 635(a) of the Communications Act. If, on the other hand, the LFA ultimately grants the franchise, the applicant's operations will continue pursuant to the negotiated franchise, rather than the interim franchise.

2. Build-Out

82. As discussed above, build-out requirements in many cases may constitute unreasonable barriers to entry into the MVPD market for facilities-based competitors.[292] Accordingly, we limit LFAs' ability to impose certain build-out requirements pursuant to Section 621(a)(1).

a. Authority

83. Proponents of build-out requirements do not offer any persuasive legal argument that the Commission lacks authority to address this significant problem and conclude that certain build-out requirements for competitive entrants are unreasonable. Nothing in the Communications Act requires competitive franchise applicants to agree to build-out their networks in any particular fashion Nevertheless, incumbent cable operators and LFAs contend that it is both lawful and appropriate, in all

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[292] *See* Section III.A., *supra*, at paras. 31-42.

circumstances, to impose the same build-out requirements on competitive applicants that apply to incumbents.[293] We reject these arguments and find that Section 621(a)(1) prohibits LFAs from refusing to award a new franchise on the ground that the applicant will not agree to unreasonable build-out requirements.

84. The only provision in the Communications Act that even alludes to build-out is Section 621(a)(4)(A), which provides that "a franchising authority . . . shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area."[294] Far from a grant of authority, however, Section 621(a)(4)(A) is actually a limitation on LFAs' authority. In circumstances when it is reasonable for LFAs to require cable operators to build out their networks in accordance with a specific plan, LFAs must give franchisees a reasonable period of time to comply with those requirements. However, Section 621(a)(4)(A) does not address the central question here: whether it may be unreasonable for LFAs to impose certain build-out requirements on competitive cable applicants. To answer that question, Section 621(a)(4)(A) must be read in conjunction with

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[293] *See, e.g.*, Comcast Reply Comments at 34; NCTA Reply Comments at 25-26; NATOA Reply Comments at 24; Southeast Michigan Municipalities Reply Comments at 44-45.

[294] 47 U.S.C. § 541(a)(4)(A).

Section 621(a)(1)'s prohibition on unreasonable refusals to award competitive franchises, and in light of the Act's twin goals of promoting competition and broadband deployment.[295]

85. Our interpretation of Section 621(a)(4)(A) is consistent with relevant jurisprudence and the legislative history. The D.C. Circuit has squarely rejected the notion that Section 621(a)(4)(A) authorizes LFAs to impose universal build-out requirements on all cable providers. The court has held that Section 621(a)(4)(A) does not require that cable operators extend service "throughout the franchise area," but instead is a limit on franchising authorities that seek to impose such obligations.[296] That decision comports with the legislative history, which indicates that Congress

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[295] *Americable Intern., Inc. v. Dep't of Navy*, 129 F.3d 1271, 1274-75 (D.C. Cir. 1997).

[296] *Id. See also Americable Intern., Inc. v. U.S. Dept. of Navy*, 931 F. Supp. 1, 2-3 (D.D.C. 1996) ("Americable argues first that the Cable Act establishes a 'requirement' that a franchise 'provide universal service throughout the franchise area.' Its authority for that position is 47 U.S.C. § 541(a)(4)(A), which requires that a franchising authority (here the Navy) allow an applicant's system 'a reasonable period of time to become capable of providing cable service to all households in the franchise area. . . .' That language contains no requirement of universal service, of course. Americable's strained argument is at odds with the purpose of the Cable Act, which is to promote competition, and of the amendment in question, which protects the interests of new franchise applicants and not incumbents like Americable").

explicitly rejected an approach that would have imposed affirmative build-out obligations on all cable providers. The House version of the bill provided that an LFA's "refusal to award a franchise shall not be unreasonable if, for example, such refusal is on the ground . . . of inadequate assurance that the cable operator will, within a reasonable period of time, provide universal service throughout the entire franchise area under the jurisdiction of the franchising authority."[297] By declining to adopt this language, Congress made clear that it did not intend to impose uniform build-out requirements on all franchise applicants.[298]

86. LFAs and incumbent cable operators also rely on Section 621(a)(3) to support compulsory build-out. That Section provides: "In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides."[299] We therefore address below some commenters' concerns that limitations on build-out requirements will contravene or render ineffective the statutory

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[297] H.R. REP. NO. 102-628, at 9 (1992).

[298] *See Doe v. Chao*, 540 U.S. 614, 622-23 (2004) (finding relevance in the fact that Congress had cut out the very language in the bill that would have achieved the result claimant urged).

[299] 47 U.S.C. § 541(a)(3).

prohibition against discrimination on the basis of income ("redlining.")[300] But for present purposes, it has already been established that Section 621(a)(3) does not mandate universal build-out. As the Commission previously has stated, "the intent of [Section 621(a)(3)] was to prevent the exclusion of cable service based on income" and "this section does not mandate that the franchising authority require the complete wiring of the franchise area in those circumstances where such an exclusion is not based on the income status of the residents of the unwired area."[301] The U.S. Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") has upheld this interpretation in the face of an argument that universal build-out was required by Section 621(a)(3):

> The statute on its face prohibits discrimination on the basis of income; it manifestly does not require universal

[300] *See, e.g.*, Comcast Reply at 2 (arguing that incumbent LECs are seeking Commission action on build-out requirements in order to pursue their "high-value" customers while bypassing "low-value" ones).

[301] *Implementing the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, MM Docket No. 84-1296, 58 Rad. Reg. 2d (P & F) 1, 62-63 (1985). BSPA Comments at 6 ("The most significant factors affecting where a wireline network will be built relate to cost of construction and the density of the population that will be served. These factors have a much more significant impact on the network expansion plans than the specific customer profile in a geographic area").

> [build-out]. . . . [The provision requires] "wiring of all areas of the franchise" *to prevent redlining.* However, if no redlining is in evidence, it is likewise clear that wiring within the franchise area can be limited.[302]

b. Discussion

87. Given the current state of the MVPD marketplace, we find that an LFA's refusal to award a competitive franchise because the applicant will not agree to specified build-out requirements can be unreasonable. Market conditions today are far different from when incumbent cable operators obtained their franchises. Incumbent cable providers were frequently awarded community-wide monopolies.[303] In that context, a requirement that the provider build out facilities to the entire community was eminently sensible. The essential bargain was that the cable operator would provide service to an entire community in exchange for its status as the only franchisee from whom customers in the community could purchase service. Thus, a financial burden was placed upon the monopoly

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[302] *ACLU v. FCC*, 823 F.2d 1554, 1580 (D.C. Cir. 1987) (emphasis in original). *See also* Consumers for Cable Choice Comments at 8; DOJ *Ex Parte* at 4.

[303] *See* H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-1260; Mercatus Center Comments at 39-40; *Phoenix Center Competition Paper* at 7.

provider in exchange for the undeniable benefit of being able to operate without competition.[304]

88. By contrast, new cable entrants must compete with entrenched cable operators and other video service providers. A competing cable provider that seeks to offer service in a particular community cannot reasonably expect to capture more than a fraction of the total market.[305] Build-out requirements thus impose significant financial risks on competitive applicants, who must incur substantial construction costs to deploy facilities within the franchise area in exchange for the opportunity to capture a relatively small percentage of the market.[306] In many instances, build-out requirements make entry so expensive that the prospective competitive provider withdraws its application and simply declines to serve any portion of the community.[307] Given the entry-deterring effect of build-out conditions, our construction of Section 621(a)(1) best serves the Act's purposes of

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[304] *See* FTTH Council Comments at 32-33; BellSouth Comments at 34.

[305] *See, e.g.*, AT&T Comments at 50; FTTH Council Comments at 29-30.

[306] *See* FTTH Council Comments at 32-35; DOJ *Ex Parte* at 12-15 (May 10, 2006); AT&T Reply Comments at 34-36; BellSouth Comments at 34-35; Verizon Comments at 39-40.

[307] *See* FTTH Council Comments at 35; BellSouth Comments at 17-19, 35; USTA Comments at 22-25; Verizon Comments at 40-42.

promoting competition and broadband deployment.[308]

89. Accordingly, we find that it is unlawful for LFAs to refuse to grant a competitive franchise on the basis of unreasonable build-out mandates. For example, absent other factors, it would seem unreasonable to require a new competitive entrant to serve everyone in a franchise area before it has begun providing service to anyone. It also would seem unreasonable to require facilities-based entrants, such as incumbent LECs, to build out beyond the footprint of their existing facilities before they have even begun providing cable service.[309] It also would seem unreasonable, absent other factors, to require more of a new entrant than an incumbent cable operator by, for instance, requiring the new entrant to build out its facilities in a shorter period of time than that originally afforded to the incumbent cable operator; or requiring the new entrant to build out and provide service to areas of lower density than those that the incumbent cable operator is required to build out to and serve.[310] We note, however, it would seem reasonable for an LFA

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[308] AT&T Comments at 62-64; BellSouth Comments at 32-33; Qwest Comments at 21-22; USTA Comments at 27; Verizon Comments at 44-46.

[309] *See supra* paras. 38-40.

[310] As we understand these franchising agreements are public documents, we find it reasonable to require the new entrant to produce the incumbent's current agreement.

in establishing build-out requirements to consider the new entrant's market penetration. It would also seem reasonable for an LFA to consider benchmarks requiring the new entrant to increase its build-out after a reasonable period of time had passed after initiating service and taking into account its market success.

90. Some other practices that seem unreasonable include: requiring the new entrant to build out and provide service to buildings or developments to which the new entrant cannot obtain access on reasonable terms; requiring the new entrant to build out to certain areas or customers that the entrant cannot reach using standard technical solutions; and requiring the new entrant to build out and provide service to areas where it cannot obtain reasonable access to and use of the public rights of way. Subjecting a competitive applicant to more stringent build-out requirements than the LFA placed on the incumbent cable operator is unreasonable in light of the greater economic challenges facing competitive applicants explained above. Moreover, build-out requirements may significantly deter entry and thus forestall competition by placing substantial demands on competitive entrants.

91. In sum, we find, based on the record as a whole, that build-out requirements imposed by LFAs can operate as unreasonable barriers to competitive entry. The Commission has broad authority under Section 621(a)(1) to determine

whether particular LFA conditions on entry are unreasonable. Exercising that authority, we find that Section 621(a)(1) prohibits LFAs from refusing to award a competitive franchise because the applicant will not agree to unreasonable build-out requirements.

c. Redlining

92. The Communications Act forbids access to cable service from being denied to any group of potential residential cable subscribers because of neighborhood income. The statute is thus clear that no provider of cable services may deploy services with the intent to redline and "that access to cable service [may not be] denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides."[311] Nothing in our action today is intended to limit LFAs' authority to appropriately enforce Section 621(a)(3) and to ensure that their constituents are protected against discrimination. This includes an LFA's authority to deny a franchise that would run afoul of Section 621(a)(3).

93. MMTC suggests that the Commission develop anti-redlining "best practices," specifically defining who is responsible for overseeing redlining issues, what constitutes redlining, and developing

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[311] 47 U.S.C. § 541.

substantial relief for those affected by redlining.[312] MMTC suggests that an LFA could afford a new entrant means of obtaining pre-clearance of its build-out plans, establishing a rebuttable presumption that the new entrant will not redline (for example, proposing to replicate a successful anti-redlining program employed in another franchise area).[313] Alternatively, an LFA could allow a new entrant to choose among regulatory options, any of which would be sufficient to allow for build-out to commence while the granular details of anti-redlining reporting are finalized.[314] We note these suggestions but do not require them.

3. Franchise Fees

94. In response to questions in the *Local Franchising NPRM* concerning existing practices that may impede cable entry,[315] various parties discussed unreasonable demands relating to franchise fees. Commenters have also indicated that unreasonable demands concerning fees or other

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[312] MMTC Comments at 22, MMTC Reply at 15. MMTC urges that The State Regulators Council of the Advisory Committee on Diversity for Communication in the Digital Age should be the oversight committee for redlining issues. MMTC Comments at 24.

[313] MMTC Reply at 11.

[314] MMTC Reply at 11 (providing examples of "rapid buildout plan," "equal service verification plan," and "combined plan").

[315] *Local Franchising NPRM*, 20 FCC Rcd at 18588.

consideration by some LFAs have created an unreasonable barrier to entry.[316] Such matters include not only the universe of franchise-related costs imposed on providers that should or should not be included within the 5 percent statutory franchise fee cap established in Section 622(b),[317] but also the calculation of franchise fees (*i.e.*, the revenue base from which the 5 percent is calculated). Accordingly, we will exercise our authority under Section 621(a)(1) to address the unreasonable demands made by some LFAs. In particular, any refusal to award an additional competitive franchise because of an applicant's refusal to accede to demands that are deemed impermissible below shall be considered to be unreasonable. The Commission's jurisdiction over franchise fee policy is well established.[318] The general law with respect to

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[316] *See, e.g.*, AT&T Reply at Attachment C at 5 ("Lynbrook, N.Y. has asked Verizon to provide cameras to film a holiday visit from Santa Claus. Deputy Mayor Thomas Miccio said, "They know if they don't get this process done they're going to be in big, big trouble, so we feel we're in a very good position."") (citing Dionne Searcey, *As Verizon Enters Cable Business, it Faces Local Static*, WALL ST. J., Oct. 28, 2005, at A1), Verizon Comments at Attachment A at 14 ("Two LFAs in California required application fees of $25,000 and $20,000, respectively. Another community in that state has requested an upfront application fee of $30,000 plus an agreement to pay additional expenses (*i.e.*, attorneys fees) of up to an additional $20,000.").

[317] 47 U.S.C. § 542(b).

[318] *See ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987) ("[I]t is clear . . . that the *ultimate* responsibility for ensuring a 'national policy' with respect to franchise fees lies with the

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franchise fees should be relatively well known, but we believe it may be helpful to restate the basic propositions here in effort to avoid misunderstandings that can lead to delay in the franchising process as well as unreasonable refusals to award competitive franchises. To the extent that our determinations are relevant to incumbent cable operators as well, we would expect that discrepancies would be addressed at the next franchise renewal negotiation period, as noted in the FNPRM *infra,* which tentatively concludes that the findings in this *Order* should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs.[319]

95. We address below four significant issues relating to franchise fee payments. First, we consider the franchise fee revenue base. Second, we examine the limitations on charges incidental to the awarding or enforcing of a franchise. Third, we discuss the proper classification of in-kind payments unrelated to the provision of cable service. Finally, we consider whether contributions in support of PEG services and equipment should be considered within the franchise fee calculation.

(Continued from previous page)
federal agency responsible for administering the Communications Act.") (emphasis in original).

[319] *See infra* para. 140.

96. The fundamental franchise fee limitation is set forth in Section 622(b), which states that "franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services."[320] Section 622(g)(1) broadly defines the term "franchise fee" to include "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such."[321] Section 622(g)(2)(c), however, excludes from the term "franchise fee" any "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities."[322] And Section 622(g)(2)(D) excludes from the term (and therefore from the 5 percent cap) "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages."[323] It has been

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[320] 47 U.S.C. § 542(b) (emphasis added). FTTH Council supports an alternative cap based on the actual costs of managing the use of public rights-of-way, but we need not address that argument because we do not have the discretion to adopt a different limit than that set by Congress.

[321] 47 U.S.C. § 542(g)(1).

[322] 47 U.S.C. § 542(g)(2)(C).

[323] 47 U.S.C. § 542(g)(2)(D).

established that certain types of "in-kind" obligations, in addition to monetary payments, may be subject to the cap. The legislative history of the 1984 Cable Act, which adopted the franchise fee limit, specifically provides that "lump sum grants not related to PEG access for municipal programs such as libraries, recreation departments, detention centers or other payments not related to PEG access would be subject to the 5 percent limitation."[324]

97. **Definition of the 5 percent fee cap revenue base.** As a preliminary matter, we address the request of several parties to clarify which revenue-generating services should be included in the gross fee figure from which the 5 percent calculation is drawn.[325] The record indicates that in the franchise application process, disputes that arise as to the propriety of particular fees can be a significant cause of delay in the process and that some franchising authorities are making unreasonable demands in this area.[326] This issue is of particular concern where a prospective new entrant for the provision of cable services is a facilities-based incumbent or competitive provider of telecommunications and/or broadband services. A number of controversies regarding which revenues

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[324] H.R. REP. NO. 98-934, at 65 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4702.

[325] Verizon Comments at 63-64; BellSouth Comments at 41-43.

[326] *See supra* paras. 43-45.

are properly subject to application of the franchise fee were resolved before the Supreme Court's decision in *NCTA v. Brand X*,[327] which settled issues concerning the proper regulatory classification of cable modem-based Internet access service. Nevertheless, in some quarters, there has been considerable uncertainty over the application of franchise fees to Internet access service revenues and other non-cable revenues. Thus, we believe it may assist the franchise process and prevent unreasonable refusals to award competitive franchises to reiterate certain conclusions that have been reached with respect to the franchise fee base.

98. We clarify that a cable operator is not required to pay franchise fees on revenues from non-cable services.[328] Section 622(b) provides that the "franchise fees paid by a cable operator with respect

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[327] 125 S. Ct. 2688 (2005). *See infra* note 331.

[328] Advertising revenue and home shopping commissions have been included in an operator's gross revenues for franchise fee calculation purposes. *See Texas Coalition of Cities for Utility Issues v. FCC*, 354 F.3d 802, 806 (5th Cir. 2003) ("A cable operator's gross revenue includes revenue from subscriptions and revenue from other sources-e.g., advertising and commissions from home shopping networks."); *City of Pasadena, California The City of Nashville, Tennessee and The City of Virginia Beach, Virginia*, 16 FCC Rcd. 18192, 2001 WL 1167612, par. 15 (2001) ("There is no dispute among the parties to this proceeding, or in relevant precedent, that advertising revenue and home shopping commissions can be considered part of an operator's gross revenues for franchise fee calculation purposes.").

to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide *cable services*."[329] The term "cable service" is explicitly defined in Section 602(6) to mean (i) "the one-way transmission to subscribers of video programming or other programming service," and (ii) "subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."[330] The Commission determined in the *Cable Modem Declaratory Ruling* that a franchise authority may not assess franchise fees on non-cable services, such as cable modem service, stating that "revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined."[331] Although this decision related specifically to Internet access service revenues, the same would be true for other "non-cable" service

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[329] 47 U.S.C. § 542(b) (emphasis added).

[330] 47 U.S.C. § 522(6).

[331] *In re Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4851 (2002) ("*Cable Modem Declaratory Ruling*"), *rev'd*, *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd*, *NCTA v. Brand X*, 545 U.S. 967 (2005). The Commission issued a notice of proposed rulemaking ("*Cable Modem NPRM*") concurrently with the *Cable Modem Declaratory Ruling*. Certain questions from the *Cable Modem NPRM* that are relevant, but not directly related, to this discussion remain pending before the Commission. *Cable Modem Declaratory Ruling* at 4839-4854.

revenues.[332] Thus, Internet access services, including broadband data services, and any other non-cable services are not subject to "cable services" fees.

99. **Charges incidental to the awarding or enforcing of a franchise.** Section 622(g)(2)(D) excludes from the term "franchise fee" "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages."[333] Such "incidental" requirements or charges may be assessed by a franchising authority without counting toward the 5 percent cap. A number of parties assert, and seek Commission clarification, that certain types of payments being requested in the franchise process are not incidental fees under Section 622(g)(2)(D) but instead must either be prohibited or counted toward the cap.[334] Furthermore, a number of parties report that disputes over such issues as well as unreasonable demands being made by some franchising authorities in this regard may be leading to delays in the franchising process as well as unreasonable refusals to award competitive franchises. We

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[332] *See* NATOA Reply at 29 (agreeing that non-cable services are not subject to franchise fees).

[333] 47 U.S.C. § 542(g)(2)(D).

[334] AT&T Comments at 65-67; BellSouth Comments at 7, 38-39.

therefore determine that non-incidental franchise-related costs required by LFAs must count toward the 5 percent franchise fee cap and provide guidance as to what constitutes such non-incidental franchise-related costs. Under the Act, these costs combined with other franchise fees cannot exceed 5 percent of gross revenues for cable service.

100. BellSouth urges us to prohibit franchising authorities from assessing fees that the authorities claim are "incidental" if those fees are not specifically allowed under Section 622 of the Cable Act.[335] BellSouth asserts that LFAs often seek fees beyond the 5 percent franchise fee allowed by the statutory provision. The company therefore asks us to clarify that any costs that an LFA requires a cable provider to pay beyond the exceptions listed in Section 622 – including generally applicable taxes, PEG capital costs, and "incidental charges" – count toward the 5 percent cap.[336] OPASTCO asserts that higher fees discourage investment and often will need to be passed on to consumers.[337] Verizon also requests that we clarify that fees that exceed the cap are unreasonable.[338]

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[335] BellSouth Comments at 7.

[336] BellSouth Comments at 38-39.

[337] OPASTCO Reply at 5.

[338] Verizon Reply at 59.

101. AT&T argues that we should find unreasonable any fees or contribution requirements that are not credited toward the franchise fee obligation.[339] AT&T also asserts that any financial obligation to the franchising authority that a provider undertakes, such as application or acceptance fees that exceed the reasonable cost of processing an application, free or discounted service to an LFA, and LFA attorney or consultant fees, should apply toward the franchise fee obligation.[340]

102. Conversely, NATOA asserts that costs such as those enumerated above by AT&T fall within Section 622(g)(2)(D)'s definition of charges "incidental" to granting the franchise.[341] NATOA contends that the word "incidental" does not refer to the *amount* of the charge, but rather the fact that a charge is "naturally appertaining" to the grant of a franchise. Thus, NATOA argues, these costs are not part of the franchise fee and therefore do not count toward the cap.[342]

103. There is nothing in the text of the statute or the legislative history to suggest that Congress intended the list of exceptions in Section

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[339] AT&T Comments at 64.

[340] AT&T Comments at 65-67.

[341] NATOA Reply at 34-35.

[342] NATOA Reply at 35 (citing Random House Dictionary of the English Language at 720).

622(g)(2)(D) to include the myriad additional expenses that some LFAs argue are "incidental."[343] Given that the lack of clarity on this issue may hinder competitive deployment and lead to unreasonable refusals to award competitive franchises under Section 621, we seek to provide guidance as to what is "incidental" for a new competitive application.[344] We find that the term "incidental" in Section 622(g)(2)(D) should be limited to the list of incidentals in the statutory provision, as well as other minor expenses, as described below. We find instructive a series of federal court decisions relating to this subsection of Section 622. These courts have indicated that (i) there are significant limits on what payments qualify as "incidental" and may be requested outside of the 5 percent fee limitation; and (ii) processing fees, consultant fees, and attorney fees are not necessarily to be regarded as "incidental" to the awarding of a franchise.[345] In

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[343] *See infra* paras. 105-108.

[344] NATOA argues that the Commission is powerless to rewrite the meaning of the statute. NATOA Reply at 35. Yet, Section 622(i) states "[a]ny Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, *except as provided in this section*." Therefore, we are within our Congressionally mandated authority to provide clarifying guidance regarding the meaning of this provision.

[345] *See Robin Cable Systems v. City of Sierra Vista*, 842 F. Supp. 380 (D. Ariz. 1993); *Time Warner Entertainment Co. v. Briggs*, 1993 WL 23710 (D. Mass. Jan. 14, 1993); *Birmingham Cable*

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Robin Cable Systems v. City of Sierra Vista, for example, the United States District Court for the District of Arizona held that "processing costs" of up to $30,000 required as part of the award of a franchise were not excluded under subsection (g)(2)(D) because they were not "incidental," but rather "substantial" and therefore "inconsistent with the Cable Act."[346] Additionally, in *Time Warner Entertainment v. Briggs,* the United States District Court for the District of Massachusetts decided that attorney fees and consultant fees fall within the definition of franchise fees, as defined in Section 622. Because the municipality in that case was already collecting 5 percent of the operator's gross revenues, the Court determined that a franchise provision requiring the cable operator to pay such fees above and beyond its 5 percent gross revenues was preempted and therefore unenforceable.[347] Finally, in *Birmingham Cable Comm. v. City of Birmingham,* the United States District for the Northern District of Alabama stated that "it would be an aberrant construction of the phrase 'incidental to the awarding ... of the franchise,' in this context, to

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Comm. v. City of Birmingham, 1989 WL 25385C (N.D. Ala. 1989).

[346] *Robin Cable* at 381.

[347] *Time Warner* at 23710 * 6.

conclude that the phrase embraces consultant fees incurred solely by the City."[348]

104. We find these decisions instructive and emphasize that LFAs must count such non-incidental franchise-related costs toward the cap. We agree with these judicial decisions that non-incidental costs include the items discussed above, such as attorney fees and consultant fees, but may include other items, as well. Examples of other items include application or processing fees that exceed the reasonable cost of processing the application, acceptance fees, free or discounted services provided to an LFA, any requirement to lease or purchase equipment from an LFA at prices higher than market value, and in-kind payments as discussed below. Accordingly, if LFAs continue to request the provision of such in-kind services and the reimbursement of franchise-related costs, the value of such costs and services should count towards the provider's franchise fee payments.[349] For future guidance, LFAs and video service providers may look to judicial cases to determine other costs that should be considered "incidental."

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[348] *Birmingham* at 253850.

[349] To the extent that an LFA requires franchise fee payments of less than 5 percent an offset may not be necessary. Such LFAs are able to request the reimbursement or provision of such costs up to the 5 percent statutory threshold.

105. **In-kind payments unrelated to provision of cable service.** The record indicates that in the context of some franchise negotiations, LFAs have demanded from new entrants payments or in-kind contributions that are unrelated to the provision of cable services. While many parties argue that franchising authority requirements unrelated to the provision of cable services are unreasonable,[350] few parties provided specific details surrounding the in-kind payment demands of LFAs.[351] As discussed further below, most parties generally discussed examples of concessions, but were unwilling to provide details of specific instances, including the identity of the LFA requesting the unrelated services.[352] Even without

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[350] Alcatel Comments at 10; FTTH Council Comments at 36; OPASTCO Reply at 4; USTelecom Comments at 48; BPSA Comments at 8; NTCA Comments at 13; South Slope Comments at 15. *See also* DOJ *Ex Parte* at 11.

[351] Some LFAs argue that commenters' allegations about inappropriate fees fail to identify the LFAs in question. As a consequence, they contend, we should not rely on such unsubstantiated claims unless the particular LFAs in question are given a chance to respond. Communications Support Group Reply at 7; Anne Arundel County Reply at 5. We need not resolve particular disputes between parties, however, in order to address this issue. Our clarification that all LFA requests not related to cable services must be counted toward the 5 percent cap is a matter of statutory construction, and all commenters have had ample opportunity to address this issue.

[352] Broadband Service Providers Association Comments at 8; AT&T Comments at 26; Verizon Comments at 57-58. Parties have indicated that they were unwilling to identify specific

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specific details concerning the LFAs involved, however, the record adequately supports a finding that LFA requests unrelated to the provision of cable services have a negative impact on the entry of new cable competitors in terms of timing and costs and may lead to unreasonable refusals to award competitive franchises. Accordingly, we clarify that any requests made by LFAs that are unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap.

106. The Broadband Service Providers Association states that an example of a municipal capital requirement can include traffic light control systems.[353] FTTH Council states that non-video requirements raise the cost of entry for new entrants and should be prohibited.[354] As an example, FTTH Council asserts that in San Antonio, Grande Communications was required to prepay $1 million in franchise fees (which took the company five years to draw down) and to fund a $50,000 scholarship, with an additional $7,200 to be contributed each year. They assert that new entrants agree to these

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instances of unreasonable requests, since in many cases these parties are still trying to negotiate franchise agreements with the communities at issue.

[353] Broadband Service Providers Association Comments at 8.

[354] FTTH Council Comments at 66.

requirements because they have no alternative.[355] The National Telecommunications Cooperative Association ("NTCA") also asserts that its members have complained that LFAs require them to accept franchise terms unrelated to the provision of video service.[356] NTCA states that any incumbent cable operator that already abides by such a requirement has made the concession in exchange for an exclusive franchise, but that new entrants, in contrast, must fight for every subscriber and will not survive if forced into expensive non-video related projects.[357]

107. AT&T refers to a press article stating that Verizon has faced myriad requests unrelated to the provision of cable service. These include: a $13 million "wish list" in Tampa, Florida; a request for video hookup for a Christmas celebration and money for wildflower seeds in New York; and a request for fiber on traffic lights to monitor traffic in Virginia.[358] Verizon provides little additional information about these examples, but argues that any requests must

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[355] *Id.* at 38.

[356] NTCA Comments at 4.

[357] NTCA Comments at 13.

[358] AT&T Comments at 26 (citing Dionne Searcey, *As Verizon Enters Cable Business, it Faces Local Static*, WALL ST. J., Oct. 28, 2005, at A1). *See also* City of Tampa Reply Comments at 5.

be considered franchise-related costs subject to the 5 percent franchise fee cap, as discussed above.[359]

108. We clarify that any requests made by LFAs unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap, as discussed above. Municipal projects unrelated to the provision of cable service do not fall within any of the exempted categories in Section 622(g)(2) of the Act and thus should be considered a "franchise fee" under Section 622(g)(1). The legislative history of the 1984 Cable Act supports this finding, providing that "lump sum grants not related to PEG access for municipal programs such as libraries, recreation departments, detention centers or other payments not related to PEG access would be subject to the 5 percent limitation."[360] Accordingly, any such requests for municipal projects will count towards the 5 percent cap.

109. **Contributions in support of PEG services and equipment.** As further discussed in the Section below, we also consider the question of the proper treatment of LFA-mandated contributions in support of PEG services and equipment. The record reflects that disputes

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[359] Verizon Comments at 54. *See also* USTelecom Comments at 48.

[360] H.R. REP. NO. 98-934, at 65 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4702.

regarding such contributions are impeding video deployment and may be leading to unreasonable refusals to award competitive franchises.[361] Section 622(g)(2)(C) excludes from the term "franchise fee" any "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities."[362] Accordingly, payments of this type, if collected only for the cost of building PEG facilities, are not subject to the 5 percent limit. Capital costs refer to those costs incurred in or associated with the construction of PEG access facilities.[363] These costs are distinct from payments in support of the use of PEG access facilities. PEG support payments may include, but are not limited to, salaries and training. Payments made in support of PEG access facilities are considered franchise fees and are subject to the 5 percent cap.[364] While Section 622(g)(2)(B) excluded from the term franchise fee any such payments made

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[361] *See, e.g.,* FTTH Council Comments at 36 (noting how Knology declined to enter the Louisville market after the Louisville LFA requested a PEG grant of $266,000 at the time of franchise grant, with $1.9 million total due over the 15-year term).

[362] 47 U.S.C. § 542(g)(2)(C).

[363] *See* H.R. REP. NO. 98-934, at 19 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4656.

[364] *See Cable TV Fund 14-A v. City of Naperville,* 1997 WL 433628 (N.D. Ill. 1997) at 13; *City of Bowie, Maryland,* 14 FCC Rcd. 7675 (Cable Service Bureau, 1999); *as clarified* 14 FCC Rcd 9596 (Cable Services Bureau, 1999).

in support of PEG facilities, it only applies to any franchise in effect on the date of enactment.[365] Thus, for any franchise granted after 1984, this exemption from franchise fees no longer applies.

4. PEG/Institutional Networks

110. In the *Local Franchising NPRM*, we tentatively concluded that it is not unreasonable for an LFA, in awarding a franchise, to "require adequate assurance that the cable operator will provide adequate public, educational and governmental access channel capacity, facilities, or financial support"[366] because this promotes important statutory and public policy goals.[367] However, pursuant to Section 621(a)(1), we conclude that LFAs may not make unreasonable demands of competitive applicants for PEG and I-Net[368] and that conditioning the award of a competitive franchise on applicants agreeing to such unreasonable demands constitutes an unreasonable refusal to award a franchise. This finding is limited to competitive applicants under Section 621(a)(1). Yet, as this issue is also germane to existing

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[365] 47 U.S.C. § 542(g)(2)(B).

[366] 47 U.S.C. § 541(a)(4)(B).

[367] *Local Franchising NPRM*, 20 FCC Rcd at 18590.

[368] An I-Net is defined as "a communication network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential customers." 47 U.S.C. § 531(f).

franchisees, we ask for further comment on the applicability of this and other findings in the *Further Notice of Proposed Rulemaking* attached hereto. The FNPRM tentatively concludes that the findings in this *Order* should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs.

111. As an initial matter, we conclude that we have the authority to address issues relating to PEG and I-Net support.[369] Some commenters argue that Congress explicitly granted the responsibility for PEG and I-Net regulation to state and local governments.[370] For example, NATOA contends that we cannot limit the in-kind or monetary support that LFAs may request for PEG access, because Sections 624(a) and (b) allow an LFA to establish requirements "related to the establishment and operation of a cable system," including facilities and equipment.[371] In response, Verizon claims that PEG requirements should extend only to channel capacity, and that LFAs can obtain other contributions only to the extent that they are agreed to voluntarily by the cable operator.[372] Verizon also

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[369] *See infra* Section III.B.2.

[370] NATOA Comments at 35; NATOA Reply at 30-31; Hawaii Reply at 2-3; Mercatus Comments at 35; Certain Florida Municipalities Comments at 17-18; Anne Arundel *et al* Comments at 35; City of New York Comments at 3-4.

[371] NATOA Reply at 30 (quoting 47 U.S.C. § 544(b)).

[372] Verizon Reply at 60-61.

asserts that the record confirms that LFAs often demand PEG support that exceeds statutory limits.[373]

112. Section 611(a) of the Communications Act operates as a restriction on the authority of the franchising authority to establish channel capacity requirements for PEG. This Section provides that "[a] franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section."[374] Section 611(b) allows a franchising authority to require that "channel capacity be designated for public, educational or governmental use," but the extent of such channel capacity is not defined.[375] Section 621(a)(4)(b) provides that a franchising authority may require "adequate assurance" that the cable operator will provide "adequate" PEG access channel capacity, facilities, or financial support."[376] Because the statute does not define the term "adequate," we have the authority to interpret what Congress meant by "adequate PEG access channel capacity, facilities, and financial support," and to prohibit excessive LFA demands in this area, if necessary. We note

[373] Verizon Reply at 60 (citing NATOA Comments).

[374] 47 U.S.C. § 531(a).

[375] 47 U.S.C. § 531(b).

[376] 47 U.S.C. § 541(a)(4)(B).

that the legislative history does not define "adequate," nor does it provide any guidance as to what Congress meant by the term.[377] We therefore conclude that "adequate" should be given its plain meaning: the term does not mean significant but rather "satisfactory or sufficient."[378] As discussed above, we have also accepted the tentative conclusion of the *Local Franchising NPRM* that Section 621(a)(1) prohibits not only the ultimate refusal to award a competitive franchise, but also the establishment of procedures and other requirements that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise. Given this conclusion and our authority to interpret the term "adequate" in Section 621(a)(4), we will provide guidance as to what constitutes "adequate" PEG support under that provision as subject to the constraints of the "reasonableness" requirement in Section 621(a)(1).

113. AT&T asserts that we should shorten the period for franchise negotiations by adopting standard terms for PEG channels.[379] We reject this suggestion and clarify that LFAs are free to establish their own requirements for PEG to the extent discussed herein, provided that the non-

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[377] *See See* H.R. REP. NO. 102-862, at 78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1260.

[378] American Heritage Dictionary, Second College Edition (1991).

[379] AT&T Reply at 15.

capital costs of such requirements are offset from the cable operator's franchise fee payments. This is consistent with the Act and the historic management of PEG requirements by LFAs.[380]

114. Consumers for Cable Choice and Verizon argue that it is unreasonable for an LFA to request a number of PEG channels from a new entrant that is greater than the number of channels that the community is using at the time the new entrant submits its franchise application.[381] We find that it is unreasonable for an LFA to impose on a new entrant more burdensome PEG carriage obligations than it has imposed upon the incumbent cable operator.

115. Some commenters also asked whether certain requirements regarding construction or financial support of PEG facilities and I-Nets are unreasonable under Section 621(a)(1). Several parties indicate that, as a general matter, PEG contributions should be limited to what is "reasonable" to support "adequate" facilities.[382] We agree that PEG support required by an LFA in

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[380] *See* 47 U.S.C. § 541(a)(4)(B); *Time Warner Cable of New York City v. City of New York*, 943 F.Supp. 1357, 1367 (S.D.N.Y 1996), *aff'd sub nom. Time Warner Cable of New York City v. Bloomberg, L.P.*, 118 F.3d 917 (2nd Cir. 1997).

[381] Consumers for Cable Choice Comments at 8; Verizon Comments at 71.

[382] BellSouth Comments at 8; Verizon Comments at 71.

exchange for granting a new entrant a franchise should be both adequate and reasonable, as discussed above. In addressing each of these concerns below, we seek to strike the necessary balance between the two statutory terms.

116. Ad Hoc Telecom Manufacturers argue that it is unreasonable to require the payment of ongoing costs to operate PEG channels, because a requirement is unrelated to right-of-way management, the fundamental policy rationale for an LFA's franchising authority.[383] In response, Cablevision asserts that exempting incumbent LECs from PEG support requirements would undermine the key localism features of franchise requirements, and could undermine the ability of incumbent cable operators to provide robust community access.[384] We disagree with Ad Hoc Telecom Manufacturers that it is *per se* unreasonable for LFAs to require the payment of ongoing costs to support PEG. Such a ruling would be contrary to Section 621(a)(4)(B) and public policy. We note, however, that any ongoing LFA-required PEG support costs are subject to the franchise fee cap, as discussed above.

117. FTTH Council, Verizon, and AT&T ask us to affirm that PEG or I-Net requirements imposed on a new entrant that are wholly duplicative of existing requirements imposed on the incumbent

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383 Ad Hoc Telecom Manufacturer Coalition Comments at 4.

384 Cablevision Reply at 29-30.

cable operator are *per se* unreasonable.[385] AT&T and Verizon argue that Section 621(a)(4)(B) requires adequate facilities, not duplicative facilities.[386] FTTH Council contends that if LFAs can require duplicative facilities, they can burden new entrants with inefficient obligations without increasing the benefit to the public.[387] FTTH Council thus suggests that LFAs be precluded from imposing completely duplicative requirements, and that we require new entrants to contribute a *pro rata* share of the incumbent cable operator's PEG obligations. For example, if an incumbent cable operator funds a PEG studio, the new entrant should be required to contribute a *pro rata* share of the ongoing financial obligation for such studio, based on the new entrant's number of subscribers.[388]

118. In addition to advocating a *pro rata* contribution rule, FTTH Council requests that we require incumbents to permit new entrants to connect with the incumbent's pre-existing PEG channel feeds.[389] FTTH Council proposes that the incumbent cable operator and new entrant decide how to accomplish this connection, with LFA

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[385] FTTH Council Comments at 66; Verizon Comments at 71; AT&T Comments at 67.

[386] AT&T Comments at 67-68; Verizon Reply at 61.

[387] FTTH Council Comments at 67.

[388] *Id.*

[389] *Id.*

involvement if necessary, and that the costs of the connection should be deducted from the new entrant's PEG-related financial obligations to the LFA.[390] Others agree that PEG interconnection is necessary to maximize the value of local access channels when more than one video provider operates in a community.[391] New entrants seek a *pro rata* contribution rule based on practical constraints as well. AT&T asserts that, although incumbent cable operators can provide space for PEG in local headend buildings, LEC new entrants' facilities are not designed to accommodate those needs. Thus, if duplicative facilities are demanded, new entrants would have to build or rent facilities solely for this purpose, which AT&T contends would be unreasonable under the statute.[392] NATOA counters that AT&T's complaint regarding space mischaracterizes PEG studio requirements that exist in some franchises.[393] Specifically, NATOA claims that LFAs generally are not concerned with a PEG studio's location, and that PEG studios are usually located near cable headends simply because those locations reduce the cable operators' costs.[394]

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[390] *Id.*

[391] Communications Support Group, Inc. Reply at 12.

[392] AT&T Comments at 70.

[393] NATOA Reply at 41-42.

[394] NATOA Reply at 42.

119. We agree with AT&T, FTTH Council, Verizon, and others that completely duplicative PEG and I-Net requirements imposed by LFAs would be unreasonable.[395] Such duplication generally would be inefficient and would provide minimal additional benefits to the public, unless it was required to address an LFA's particular concern regarding redundancy needed for, for example, public safety. We clarify that an I-Net requirement is not duplicative if it would provide additional capability or functionality, beyond that provided by existing I-Net facilities. We note, however, that we would expect an LFA to consider whether a competitive franchisee can provide such additional functionality by providing financial support or actual equipment to supplement existing I-Net facilities, rather than by constructing new I-Net facilities. Finally, we find that it is unreasonable for an LFA to refuse to award a competitive franchise unless the applicant agrees to pay the face value of an I-Net that will not be constructed. Payment for I-Nets that ultimately are not constructed are unreasonable as they do not serve their intended purpose.

120. While we prefer that LFAs and new entrants negotiate reasonable PEG obligations, we

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[395] If a new entrant, for technical, financial, or other reasons, is unable to interconnect with the incumbent cable operator's facilities, it would not be unreasonable for an LFA to require the new entrant to assume the responsibility of providing comparable facilities, subject to the limitations discussed herein.

find that under Section 621 it is unreasonable for an LFA to require a new entrant to provide PEG support that is in excess of the incumbent cable operator's obligations. We also agree that a *pro rata* cost sharing approach is one reasonable means of meeting the statutory requirement of the provision of adequate PEG facilities. To the extent that a new entrant agrees to share *pro rata* costs with the incumbent cable operator, such an arrangement is *per se* reasonable.[396]

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[396] To determine a new entrant's *per se* reasonable PEG support payment, the new entrant should determine the incumbent cable operator's per subscriber payment at the time the competitive applicant applies for a franchise or submits its informational filing, and then calculate the proportionate fee based on its subscriber base. A new entrant may agree to provide PEG support over and above the incumbent cable operator's existing obligations, but such support is at the entrant's discretion. If the new entrant agrees to share the *pro rata* costs with the incumbent cable operator, the PEG programming provider, be it the incumbent cable operator, the LFA, or a third-party programmer, must allow the new entrant to interconnect with the existing PEG feeds. The costs of such interconnection should be borne by the new entrant. We note that we previously have required cost-sharing and interconnection for PEG channels and facilities in another context. Section 75.1505(d) of the Commission's rules requires that if an LFA and OVS operator cannot reach an agreement on the OVS operator's PEG obligations, the operator is required to match the incumbent cable operator's PEG obligations and the incumbent cable operator is required to permit the OVS operator to connect with the existing PEG feeds, with such costs borne by the OVS operator. 47 C.F.R. § 76.1505(d).

5. Regulation of Mixed-Use Networks

121. We clarify that LFAs' jurisdiction applies only to the provision of cable services over cable systems. To the extent a cable operator provides non-cable services and/or operates facilities that do not qualify as a cable system, it is unreasonable for an LFA to refuse to award a franchise based on issues related to such services or facilities. For example, we find it unreasonable for an LFA to refuse to grant a cable franchise to an applicant for resisting an LFA's demands for regulatory control over non-cable services or facilities.[397] Similarly, an LFA has no authority to insist on an entity obtaining a separate cable franchise in order to upgrade non-cable facilities. For example, assuming an entity (*e.g.*, a LEC) already possesses authority to access the public rights-of-way, an LFA may not require the LEC to obtain a franchise solely for the purpose of upgrading its network.[398] So long as there is a non-cable purpose associated with the network upgrade, the LEC is not required to obtain a franchise until and unless it proposes to offer cable services. For example, if a LEC deploys fiber optic cable that can be used for cable and non-cable services, this deployment alone does not trigger the obligation to

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[397] Verizon Comments at 75.

[398] *See* Verizon Comments at 21. *See also* South Slope Comments at 11; NCTA Comments at 12.

obtain a cable franchise. The same is true for boxes housing infrastructure to be used for cable and non-cable services.

122. We further clarify that an LFA may not use its video franchising authority to attempt to regulate a LEC's entire network beyond the provision of cable services. We agree with Verizon that the "entirety of a telecommunications/data network is not automatically converted to a 'cable system' once subscribers start receiving video programming."[399] For instance, we find that the provision of video services pursuant to a cable franchise does not provide a basis for customer service regulation by local law or franchise agreement of a cable operator's entire network, or any services beyond cable services.[400] Local regulations that attempt to regulate any non-cable services offered by video providers are preempted because such regulation is beyond the scope of local franchising authority and is inconsistent with the definition of "cable system" in Section 602(7)(C).[401] This provision explicitly states that a common carrier facility subject to Title II is considered a cable system "to the extent such facility is used in the transmission of video programming . . . ."[402] As

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[399] Verizon Comments at 83.

[400] Verizon Comments at 75.

[401] 47 U.S.C. § 522(7)(C). *See also* Verizon Comments at 82-87.

[402] 47 U.S.C. § 522(7)(C).

discussed above, revenues from non-cable services are not included in the base for calculation of franchise fees.

123. In response to requests that we address LFA authority to regulate "interactive on-demand services,"[403] we note that Section 602(7)(C) excludes from the definition of "cable system" a facility of a common carrier that is used solely to provide interactive on-demand services.[404] "Interactive on-demand services" are defined as "service[s] providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming prescheduled by the programming provider."[405] We do not address at this time what particular services may fall within the definition.

124. We note that this discussion does not address the regulatory classification of any particular video services being offered. We do not address in this *Order* whether video services provided over Internet Protocol are or are not "cable services."[406]

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[403] *See* BellSouth at 42; NATOA Reply at 27-28.

[404] 47 U.S.C. § 522(7)(C).

[405] 47 U.S.C. § 522(12).

[406] *See IP-Enabled Services*, 19 FCC Rcd 4863 (2004); Petition of SBC Communications Inc. for a Declaratory Ruling, WC Docket No. 04-36 (filed Feb. 5, 2004); Letter from James C. Smith, Senior Vice President, SBC Services Inc., to Marlene H.

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D. Preemption of Local Laws, Regulations and Requirements

125. Having established rules and guidance to implement Section 621(a)(1), we turn now to the question of local laws that may be inconsistent with our decision today. Because the rules we adopt represent a reasonable interpretation of relevant provisions in Title VI as well as a reasonable accommodation of the various policy interests that Congress entrusted to the Commission, they have preemptive effect pursuant to Section 636(c). Alternatively, local laws are impliedly preempted to the extent that they conflict with this *Order* or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[407]

126. At that outset of this discussion, it is important to reiterate that we do not preempt state law or state level franchising decisions in this *Order*.[408] Instead, we preempt only local laws, regulations, practices, and requirements to the extent that: (1) provisions in those laws, regulations, practices, and agreements conflict with the rules or guidance adopted in this *Order*; and (2) such provisions are not specifically authorized by state

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Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-36 (filed Sept. 14, 2005).

[407] *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963).

[408] *See supra* note 2.

law. As noted above,[409] we conclude that the record before us does not provide sufficient information to make determinations with respect to franchising decisions where a state is involved, issuing franchises at the state level or enacting laws governing specific aspects of the franchising process. We expressly limit our findings and regulations in this *Order* to actions or inactions at the local level where a state has not circumscribed the LFA's authority. For example, in light of differences between the scope of franchises issued at the state level and those issued at the local level, it may be necessary to use different criteria for determining what may be unreasonable with respect to the key franchising issues addressed herein. We also recognize that many states only recently have enacted comprehensive franchise reform laws designed to facilitate competitive entry. In light of these facts, we lack a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises.

127. Section 636(c) of the Communications Act provides that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be

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[409] *Id.*

preempted and superseded."[410] In the *Local Franchising NPRM*, the Commission tentatively concluded that, pursuant to the authority granted under Sections 621 and 636(c), and under the Supremacy Clause,[411] the Commission may deem to be preempted any state or local law that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Title VI.[412] For example, we may deem preempted any local law that causes an unreasonable refusal to award a competitive franchise in violation of Section 621(a)(1).[413] Accordingly, the Commission sought comment on whether it would be appropriate to preempt state and local legislation to the extent we find that it serves as an unreasonable barrier to the grant of competitive franchises.

128. The doctrine of federal preemption arises from the Supremacy Clause, which provides that federal law is the "supreme Law of the Land."[414] Preemption analysis requires a statute-specific inquiry. There are various avenues by which state law may be superseded by federal law. We focus on

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[410] 47 U.S.C. § 556(c).

[411] U.S. Const., Art. VI, cl.2.

[412] *Local Franchising NPRM*, 20 FCC Rcd at 18589.

[413] *Id.*

[414] U.S. Const. Art. VI, cl. 2. *See also Hillsborough County, Florida v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712-13 (1985).

the two which are most relevant here. First, preemption can occur where Congress expressly preempts state law.[415] When a federal statute contains an express preemption provision, the preemption analysis consists of identifying the scope of the subject matter expressly preempted and determining if a state's law falls within its scope.[416] Second, preemption can be implied and can occur where federal law conflicts with state law.[417] Courts have found implied "conflict preemption" where compliance with both state and federal law is impossible or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[418]

129. Applying these principles to this proceeding, we find that local franchising laws, regulations, and agreements are preempted to the extent they conflict with the rules we adopt in this *Order*. Section 636(c) expressly preempts state and local laws that are inconsistent with the Communications Act.[419] This provision precludes states and localities from acting in a manner inconsistent with the Commission's interpretations of Title VI so long as those interpretations are

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[415] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

[416] *Id.* at 517.

[417] *Florida Lime and Avocado Growers*, 373 U.S. at 142-43.

[418] *Id.*

[419] 47 U.S.C. § 556(c).

valid.[420] It is the Commission's job, in the first instance, to determine the scope of the subject matter expressly preempted by Section 636.[421] As noted elsewhere, we adopt the rules in this *Order* pursuant to our interpretation of Section 621(a)(1) and other relevant Title VI provisions in light of the twin congressional goals of promoting competition in the multichannel video marketplace and promoting broadband deployment.[422] These rules represent a reasonable interpretation of relevant provisions in Title VI as well as a reasonable accommodation of the various policy interests that Congress entrusted to the Commission. They therefore have preemptive effect pursuant to Section 636(c).

130. Alternatively, we find that such local laws, regulations, and agreements are impliedly preempted to the extent that they conflict with this *Order* or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[423] Among the stated purposes of Title VI is to (1) "establish a national policy concerning cable

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[420] *See, e.g., Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216 (1st Cir. 2005) (finding municipal ordinances that imposed franchise fees on cable operators were preempted under Section 636(c) where inconsistent with Section 622 of the Communications Act).

[421] *See Cipollone*, 505 U.S. at 517; *Capital Cities Cable*, 467 U.S. 691, 699 (1984).

[422] *See supra* paras. 2-4, 61-64.

[423] *Florida Lime and Avocado Growers*, 373 U.S. at 142-43.

communications," (2) "establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community," and (3) "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."[424] The legislative history to both the 1984 and 1992 Cable Acts identifies a national policy of encouraging competition in the multichannel video marketplace and recognizes the national implications that the local franchising process can have on that policy.[425] The national policy of promoting a competitive multichannel video marketplace has been repeatedly reemphasized by Congress, the Commission, and the courts.[426] The record here shows that the current

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[424] 47 U.S.C. § 521 (1), (2) & (6).

[425] *See* H.R. REP. NO. 98-934, at 19 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4656; S. REP. NO. 97-518, at 14 (1982) ("free and open competition in the marketplace" and the "elimination and prevention of artificial barriers to entry" are essential to the growth and development of the cable industry); H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-60.

[426] *See, e.g.*, 47 U.S.C. § 521(6) (stating that one of the purposes of Title VI is "to promote competition in cable communications"); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 309 (1993) (recognizing "[o]ne objective of the Cable Act was to set out 'franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs

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operation of the franchising process at the local level conflicts with this national multichannel video policy by imposing substantial delays on competitive entry and requiring unduly burdensome conditions that deter entry.[427] And to the extent that local

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and interests of the local community.'" (citing 47 U.S.C. § 521(2))).

[427] *See, e.g.*, AT&T Reply at 6-7 ("today's standardless franchising process, and the anticompetitive substantive conditions demanded of new entrants by many LFAs ... not only delay entry, but often prevent it altogether"); AT&T Comments at 43 (listing several conditions commonly imposed in the local franchising process that raise the cost of entry, deter broadband investment, and deny consumers the benefits of competition and choice); Verizon Comments at iv-vi (the franchising process is often marked by inordinate delay and is often used by many LFAs "as an opportunity to demand all manner of additional concessions, mostly unrelated to the provision of video services or the underlying purposes of franchise requirements, from the would-be competitor"); TIA Comments at 7-15 (many LFAs unreasonably delay the grant of competitive franchises and demand excessive concessions from potential entrants); USTA Comments at 19-20 ("The single biggest obstacle to widespread competition in the video service market is the requirement that a provider obtain an individually negotiated local franchise in each area where it intends to provide service"); FTTH Council Comments at 59-60 ("the franchising process as implemented by numerous LFAs across the country continues to suffer from numerous flaws that frustrate the twin Congressional objectives of promoting cable competition and fostering deployment of advanced services to all Americans"); Alcatel Comments at 19 ("[t]he regulatory obstacle of thousands of local video franchises potentially wielding their authority to adopt unreasonable
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requirements result in LFAs unreasonably refusing to award competitive franchises, such mandates frustrate the policy goals underlying Title VI. The rules we adopt today, *e.g.*, limits on the time period for LFA action on competitive franchise applications,[428] limits on LFA's ability to impose build-out requirements,[429] and limits on LFA collection of franchise fees,[430] are designed to ensure efficiency and fairness in the local franchising process and to provide certainty to prospective marketplace participants. This, in turn, will allow us to effectuate Congress' twin goals of promoting cable competition and minimizing unnecessary and unduly burdensome regulation on cable systems. Thus, not only are Section 636(c)'s requirements for preemption satisfied, but preemption in these circumstances is proper pursuant to the Commission's judicially recognized ability, when acting pursuant to its delegated authority, to preempt local regulations that conflict with or stand as an obstacle to the accomplishment of federal

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requirements will invariably impede deployment by competitors and negatively impact investment in advanced technologies and services").

[428] *See supra* Section III.C.1.

[429] *See supra* Section III.C.2.

[430] *See supra* Section III.C.3.

objectives.[431]

131. We reject the claim by incumbent cable operators and franchising authorities that the Commission lacks authority to preempt local requirements because Congress has not explicitly granted the Commission the authority to preempt.[432] These commenters suggest that because the Commission seeks to preempt a power traditionally exercised by a state or local government (*i.e.*, local franchising), under the Fifth Circuit's decision in *City of Dallas*,[433] the Commission can only preempt where it is given express statutory authority to do so.[434] However, this argument ignores the plain language of Section 636(c), which states that "any provision of law of any State, political subdivision, or agency therefore, or franchising authority ... which is inconsistent with this chapter shall be deemed to be preempted and superseded."[435] Moreover, Section 621 expressly limits the authority of franchising authorities by prohibiting exclusive franchises and unreasonable refusals to award additional

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[431] *See, e.g., Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 369 (1986).

[432] *See* Comcast Comments at 36-37; Comcast Reply at 35-37; Burnsville/Eagan Comments at 35-36.

[433] *City of Dallas*, 165 F.3d at 341.

[434] *See* Comcast Comments at 37; Comcast Reply at 36; Burnsville/Eagan Comments at 35-36.

[435] 47 U.S.C. § 556(c).

competitive franchises.[436] Congress could not have stated its intent to limit local franchising authority more clearly. These provisions therefore satisfy any express preemption requirement.[437]

132. Furthermore, as long as the Commission acts within the scope of its delegated authority in adopting rules that implement Title VI, including the prohibition of Section 621(a)(1), its rules have preemptive effect.[438] Courts assess

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[436] 47 U.S.C. § 541(a)(1).

[437] *See Liberty Cablevision of Puerto Rico v. Municipality of Caguas*, 417 F.3d 216, 221 (1st Cir. 2005) (Section 636(c) makes clear that Congress "unmistakably" intended to preempt state and local franchising decisions that are inconsistent with the Act, including Section 621); *Qwest Broadband Services, Inc. v. City of Boulder*, 151 F. Supp. 2d. 1236, 1243 (D. Colo. 2001) (a franchise provision in the Boulder, Colorado charter was preempted by Section 621(a)(1) because it conflicted directly with that provision's mandate that the "franchising authority" be responsible for granting the franchise).

[438] *See City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof"); *Louisiana Public Serv. Comm.*, 476 U.S. at 369 ("a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation"); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (when a federal agency promulgates regulations intended to preempt state law, courts uphold preemption as long as the agency's choice "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute"); *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153 ("Federal

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whether an agency acted within the scope of its authority "without any presumption one way or the other"; there is no presumption against preemption in this context.[439] As noted above, Congress charged the Commission with the task of administering the Communications Act, including Title VI, and the Commission has clear authority to adopt rules implementing provisions such as Section 621.[440] Consequently, our rules preempt any contrary local regulations.[441]

133. We also find no merit in incumbent cable operators' and local franchising authorities' argument that the scope of the Commission's preemption authority under Section 636(c) is limited by the terms of Section 636(a) of the Act.[442] Section

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regulations have no less pre-emptive effect than federal statutes").

[439] *New York v. FERC*, 535 U.S. 1, 18 (2002).

[440] *See supra* paras. 53-64.

[441] See Fidelity Federal Savings & Loan Assn. v. De la Cuesta, 458 U.S. 141, 153-58 (1982); City of New York, 486 U.S. at 64. See also AT&T Comments at 41-42.

[442] *See* Comcast Comments at 39 (citing 47 U.S.C. § 556(a)). *See also* Florida Municipalities Comments at 18-19 (the Cable Act provides for limited preemption of local regulatory efforts in certain specific areas, none of which cover competitive franchises). Commenters further point to the legislative history for Section 636(a), which noted that a state may "exercise authority over the whole range of cable activities, such as negotiations with cable operators; consumer protection;

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636(a) provides that nothing in Title VI "shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this title."[443] The very reason for preemption in these circumstances is that many local franchising laws and practices are at odds with the express provisions of Title VI, as interpreted in this *Order*. Consequently, Section 636(a) presents no obstacle to preemption here. We therefore need not decide whether the state and local laws at issue relate to "matters of public health, safety, and welfare" within the meaning of Section 636(a).

134. We also reject the franchising authorities' argument that any attempt to preempt lawful local government control of public rights-of-way by interfering with local franchising requirements, procedures and processes could constitute an unconstitutional taking under the Fifth Amendment of the United States

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construction requirements; rate regulation or deregulation; the assessment of financial qualifications; the provision of technical assistance with respect to cable; and other franchise-related issues – as long as the exercise of that authority is consistent with Title VI." *See* Comcast Comments at 39-40 (citing H.R. REP. NO. 98-934, at 94 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4731).

[443] 47 U.S.C. § 556(a) (emphasis added).

Constitution.[444] The "takings" clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation."[445] We conclude that our actions here do not run afoul of the Fifth Amendment for several reasons. To begin with, our actions do not result in a Fifth Amendment taking. Courts have held that municipalities generally do not have a compensable "ownership" interest in public rights-of-way,[446] but rather hold the public streets and sidewalks in trust for the public.[447] As one court explained, "municipalities generally possess no rights to profit from their streets unless specifically authorized by the state."[448] Also, we note that telecommunications

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444 *See* Texas Coalition of Cities Comments at 29-35; Burnsville/Eagan Comments at 38. Burnsville/Eagan further argues that Fifth Amendment concerns would arise if the Commission were to interfere with the terms under which a competitive franchise is granted, thereby forcing modifications to existing cable franchises, pursuant to state and local level-playing-field requirements, thus depriving LFAs of lawful and reasonable compensation they negotiated with the incumbent cable operators for the use of public rights-of-way.

445 U.S. Const. Amend. V.

446 *See Liberty Cablevision*, 417 F.3d at 222.

447 *See New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 130 F.Supp.2d 631, 638 (D.N.J. 2001); *see also Liberty Cablevision*, 417 F.3d at 222 (recognizing that it is "'a mistake to suppose ... [that] the city is constitutionally and necessarily entitled to compensation'" for use of the city streets).

448 *See Liberty Cablevision*, 417 F.3d at 222.

carriers that seek to offer video service already have an independent right under state law to occupy rights-of-way.[449] States have granted franchises to telecommunications carriers, pursuant to which the carriers lawfully occupy public rights-of-way for the purpose of providing telecommunications service.[450] Because all municipal power is derived from the state,[451] courts have held that "a state can take public rights-of-way without compensating the municipality within which they are located."[452] Given the municipality is not entitled to compensation when its interest in the streets are taken pursuant to state law, it is difficult to see how the transmission of additional video signals along those same lines results in any physical occupation of public rights-of-way beyond that already permitted by the states.[453]

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[449] *See* Verizon Reply at 25.

[450] *See* Verizon Reply at 25; South Slope Comments at 10-11; NCTA Comments at 12.

[451] *See St. Louis v. Western Union Telegraph Co.*, 149 U.S. 465, 467 (1893); *Liberty Cablevision*, 417 F.3d at 221.

[452] *See City & County of Denver*, 18 P.3d 748, 761 (Colo. 2001).

[453] *See* Verizon Reply at 25-26. *See also C/R TV, Inc. v. Shannondale, Inc.*, 27 F.3d 104, 109 (4th Cir. 1994) (reasoning that the transmission of cable television signals "would not impose an additional burden on [a] servient estate" on which telephone poles, power lines, and telephone wires had previously been installed).

135. Moreover, even if there was a taking, Congress provided for "just compensation" to the local franchising authorities.[454] Section 622(h)(2) of the Act provides that a local franchising authority may recover a franchise fee of up to 5 percent of a cable operator's annual gross revenue.[455] Congress enacted the cable franchise fee as the consideration given in exchange for the right to use the public ways.[456] The implementing regulations we adopt today do not eviscerate the ability of local authorities to impose a franchise fee. Rather, our actions here simply ensure that the local franchising authority does not impose an excessive fee or other unreasonable costs in violation of the express statutory provisions and policy goals encompassed in Title VI.[457]

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[454] *See U.S. v. Riverside Bayview Homes,* 474 U.S. 121, 128 (1985) (the Fifth Amendment does not prohibit takings, only uncompensated ones). Because we find that the statute provides just compensation, we need not address whether the takings clause of the Fifth Amendment encompasses the property interests of state and local governments in the same way that it applies to the property interests of private persons.

[455] 47 U.S.C. § 542(h)(2).

[456] In passing the 1984 Cable Act, Congress recognized local government's entitlement to "assess the cable operator a fee for the operator's use of public ways," and established "the authority of a city to collect a franchise fee of up to 5 percent of an operator's annual gross revenues." H.R. REP. NO. 98-934, at 26 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4663.

[457] For the reasons stated above, we need not reach the issue of whether a "taking" has occurred with respect to a competitive

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136. Finally, LFAs maintain that the Commission's preemption of local governmental powers offends the Tenth Amendment of the U.S. Constitution.[458] The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[459] In support of their position, commenters argue that the Commission is improperly attempting to override local government's duty to "maximize the value of local property for the greater good" by imposing a federal regulatory scheme onto the states and/or local governments.[460] Contrary to the local franchising authorities' claim, however, they have failed to demonstrate any violation of the Tenth Amendment.[461] "If a power is delegated to Congress

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applicant providing cable service over the same network it uses to provide telephone service, for which it is already authorized by the local government to use the public rights-of-way.

[458] *See* Michigan Municipal League Comments at 24 ("[a]ny action by the Commission to mandate the granting of a franchise directly or by means of state actions in favor of any party over the objection of the local franchising authority offends the Tenth Amendment of the U.S. Constitution"); Anne Arundel County Comments at 50 (same).

[459] U.S. Const. Amend. X.

[460] *See* Michigan Municipal League Comments at 25; Anne Arundel County Comments at 51.

[461] *See* Verizon Reply at 27-29.

in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States."[462] Thus, when Congress acts within the scope of its authority under the Commerce Clause, no Tenth Amendment issue arises.[463] Regulation of cable services is well within Congress' authority under the Commerce Clause.[464] Thus, because our authority in this area derives from a proper exercise of congressional power, the Tenth Amendment poses no obstacle to our preemption of state and local franchise law or practices.[465] Likewise, there is no merit to LFA commenters' suggestion that Commission regulation of the franchising process would constitute an improper "commandeering" of state governmental power.[466] The Supreme Court has recognized that "where Congress has the authority to regulate private activity under the Commerce Clause," Congress has the "power to offer

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[462] *See New York v. U.S.,* 505 U.S. 144, 156 (1992).

[463] *See id.* at 157-58.

[464] *See Crisp,* 467 U.S. at 700-701 (holding that cable services are interstate services).

[465] *See Qwest Broadband Services, Inc. v. City of Boulder,* 151 F.Supp.2d 1236, 1245 ("the inquiries under the Commerce Clause and the Tenth Amendment are mirror images, and a holding that a Congressional enactment does not violate the Commerce Clause is dispositive of a Tenth Amendment challenge) (citing *United States v. Baer,* 235 F.3d 561, 563 n.6 (10th Cir. 2000). *See also* Verizon Reply at 28.

[466] *See* Michigan Municipal League Comments at 25; Anne Arundel County Comments at 51.

States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation."[467] And here, we are simply requiring local franchising authorities to exercise their regulatory authority according to federal standards, or else local requirements will be preempted. For all of these reasons, our actions today do not offend the Tenth Amendment.

137. We do not purport to identify every local requirement that this *Order* preempts. Rather, in accordance with Section 636(c), we merely find that local laws, regulations and, agreements are preempted to the extent they conflict with this *Order* and the rules adopted herein. For example, local laws would be preempted if they: (1) authorize a local franchising authority to take longer than 90 days to act on a competitive franchise application concerning entities with existing authority to access public rights-of-way, and six months concerning entities that do not have authority to access public rights-of-way;[468] (2) allow an LFA to impose unreasonable build-out requirements on competitive franchise applicants;[469] or (3) authorize or require a local franchising authority to collect franchise fees in excess of the fees authorized by law.[470]

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[467] *See New York v. U.S.*, 505 U.S. at 167.

[468] *See supra* at Section III.C.1.

[469] *See supra* at Section III.C.2.

[470] *See supra* at Section III.C.3.

138. One specific example of the type of local laws that this *Order* preempts are so-called "level-playing-field" requirements that have been adopted by a number of local authorities.[471] We find that these mandates unreasonably impede competitive entry into the multichannel video marketplace by requiring LFAs to grant franchises to competitors on substantially the same terms imposed on the incumbent cable operators.[472] As an initial matter,

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[471] *See, e.g.*, GMTC Comments at 15.

[472] *See* FTTH Council Comments at 28-31 ("there is substantial evidence that level playing field requirements have harmed new entrants or simply scared off applicants in the first place"); Verizon Comments at 76-80 (level-playing-field provisions are "protectionist requirements" for the benefit of the incumbent cable operator and are often cited as a basis for imposing all manner of additional costs and obligations, many of which are unreasonable and/or unlawful, on a would-be new entrant into the market); USTA Reply at 23-26, 32-34 (level-playing-field laws intrinsically limit the ability of LFAs to award franchises); *see also*, GAO Report. *Wire-Based Competition Benefited Consumers in Selected Markets* (Feb. 2004), GAO-04-241 Report at 21 (noting that one local official indicated that the level-playing-field law in his state was a factor in an interested competitive cable company's retracting a cable application); BSPA Comments at 4-5 (level-playing-field statutes are a superficial appeal to fairness that masks the real intent to protect the incumbent's market position, and such requirements delay or limit the growth of competition by negatively impacting the availability or use of capital); Letter from Lawrence Spiwak, President, Phoenix Ctr. For Advanced Legal and Econ. Pub. Policy Studies, to Marlene Dortch, Secretary, Federal Communications Commission at Attachment, *Phoenix Center Policy Paper Number 21: Competition After Unbundling: Entry, Industry Structure and*

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just because an incumbent cable operator may agree to franchise terms that are inconsistent with provisions in Title VI, LFAs may not require new entrants to agree to such unlawful terms pursuant to level-playing-field mandates because any such requirement would conflict with Title VI. Moreover, the record demonstrates that aside from this specific scenario, level-playing-field mandates imposed at the local level deter competition in a more fundamental manner. The record indicates that in today's market, new entrants face "steep economic challenges" in an "industry characterized by large fixed and sunk costs," without the resulting benefits incumbent cable operators enjoyed for years as monopolists in the video services marketplace.[473]

(Continued from previous page)

Convergence, 37 ("presence of a 'first mover' advantage means that requiring a new entrant to bear an entry cost simply because the incumbent cable operator has already borne it will have the effect of deterring entry substantially, even if such costs did not deter the incumbent cable operator from offering service") (March 13, 2006) ("*Phoenix Center Competition Paper*"); DOJ *Ex Parte* at 16. *But see* Comcast Comments at 40 (maintaining that state level-playing-field statutes are a legitimate and well-established exercise of state and local regulatory authority and are not inconsistent with the Communications Act); NATOA Reply at 43-44 (maintaining that there is little or no evidence to suggest that state level-playing-field laws have had anywhere near the draconian effect on the granting of competitive franchises as the telephone industry alleges).

[473] *See* USTA Reply at 24. *See also*, Verizon Reply at 65 ("In exchange for the costs they incurred to enter the market, the

(continued)

According to commenters, "a competitive video provider who enters the market today is in a fundamentally different situation" from that of the incumbent cable operator: "[w]hen incumbents installed their systems, they had a captive market," whereas new entrants "have to 'win' every customer from the incumbent" and thus do not have "anywhere near the number of subscribers over which to spread the costs."[474] Commenters explain that "unlike the incumbents who were able to pay for any of the concessions that they grant an LFA out of the supra-competitive revenue from their on-going operations," "new entrants have no assured market position."[475] Based on the record before us, we thus

(Continued from previous page)
incumbent cable operators generally received exclusive franchises and enjoyed all of the benefits of being monopoly providers for years, often decades."); Mercatus Comments at 40 ("while a second cable operator will have to make the same unrecoverable investment previously made by the incumbent, it will not have the benefit of a monopoly over which to amortize it"); FTTH Council Comments at 3 ("New entrants are highly unlikely to ever obtain and enjoy the fruits of market power. Consequently, the burdens of the pre-existing franchising process from the perspective of these new entrants are not offset by the benefits that the monopolists enjoyed.").

[474] *See* FTTH Council Comments at 30 (quoting Andy Sarwal Declaration, para. 7); Verizon Comments at 77 (new entrants "[face] ubiquitous competition from strong and entrenched competitors, which in turn leads to lower market share and lower profit margins").

[475] *See* Verizon Reply at 65. *See also* USTA Reply at 24.

find that an LFAs refusal to award an additional competitive franchise unless the competitive applicant meets substantially all the terms and conditions imposed on the incumbent cable operator may be unreasonable, and inconsistent with the "unreasonable refusal" prohibition of Section 621(a)(1). Accordingly, to the extent a locally-mandated level-playing-field requirement is inconsistent with the rules, guidance, and findings adopted in this *Order*, such requirement is deemed preempted.[476]

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[476] We also find troubling the record evidence that suggests incumbent cable operators use "level-playing-field" requirements to frustrate negotiations between LFAs and competitive providers, causing delay and preventing competitive entry. *See, e.g.*, Letter from John Goodman, Broadband Service Providers Association, to Marlene Dortch, Secretary, Federal Communications Commission (March 3, 2006) (explaining that the incumbent cable operator used level-playing-field requirements to bring litigation against the LFA which delayed the negotiation process and made entry so expensive that it no longer became feasible for the new entrant); Texas Coalition of Cities Comments at 13 ("Most delays in *competitive franchise* negotiations result from the incumbent cable provider's demands that competitive providers' franchises contain virtually identical terms."); Verizon Reply at 65-66 ("incumbents' over-eagerness to support these anticompetitive requirements further evidences the need for the Commission to remove this roadblock to competition").

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

139. As discussed above, this proceeding is limited to competitive applicants under Section 621(a)(1).[477] Yet, some of the decisions in this *Order* also appear germane to existing franchisees. We asked in the *Local Franchising NPRM* whether current procedures and requirements were appropriate for any cable operator, including existing operators.[478] NCTA argues that if the Commission establishes franchising relief for new entrants, we should do the same for incumbent cable operators because imposing similar franchising requirements on new entrants and incumbent cable operators promotes competition.[479] Somewhat analogously, the BSPA argues that any new franchise regulatory relief should extend to all current competitive operators and new entrants equally; otherwise, the inequities would effectively penalize existing competitive franchisees simply because they were the first to risk competition with

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[477] *See supra* paras. 1, 113.

[478] *Local Franchising NPRM*, 20 FCC Rcd at 18588.

[479] NCTA Comments at 13 (quoting *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853, 14855-56, 14864-65 (2005) "[T]reating like services alike promotes competition" by allowing the market to determine the better operator rather than providing one operator "artificial regulatory advantages"). *See also* Cox Reply at 2-4.

the incumbent cable operator.[480] The record does not indicate any opposition by new entrants to the idea that any relief afforded them also be afforded to incumbent cable operators.[481] Some incumbent cable operators discussed the potential impact of Commission action under Section 621 on incumbent cable operators. For example, Charter argues that granting competitive cable providers entry free from local franchise requirements would affect Charter's ability to satisfy its existing obligations; funds that Charter might use to respond to competition by investing in new facilities and services would instead be tied up in franchise obligations not imposed on Charter's competitors, which would undermine the company's investment and render its franchise obligations commercially impracticable.[482] AT&T argues that competition will not harm incumbent cable operators: cable has handled the competition that DBS presents, and analysts predict that the

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[480] BSPA Comments at 2-3.

[481] *See, e.g.*, BSPA Comments at 2-3 (any new regulatory relief in franchising should apply to all current competitive operators and potential new entrants). *But see* FTTH Council Comments at 24 (new entrants are not treated more favorably than incumbents when they are burdened with the same requirements as incumbents but do not have the same market power).

[482] Charter Comments at 3-4.

new wave of competition will not put them out of business.[183]

140. We tentatively conclude that the findings in this *Order* should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs. We note that Section 611(a) states "A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use" and Section 622(a) provides "any cable operator may be required under the terms of any franchise to pay a franchise fee." These statutory provisions do not distinguish between incumbents and new entrants or franchises issued to incumbents versus franchises issued to new entrants. We seek comment on our tentative conclusion. We also seek comment on our authority to implement this finding. We also seek comment on what effect, if any, the findings in this *Order* have on most favored nation clauses that may be included in existing franchises. The Commission will conclude this rulemaking and release an order no later than six months after release of this *Order*.

141. In the *Local Franchising NPRM,* we also sought comment on whether customer service requirements should vary greatly from jurisdiction

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[183] AT&T Reply at 5.

to jurisdiction.[484] In response, AT&T urges us to adopt rules to prevent LFAs from imposing various data collection and related requirements in exchange for a franchise.[485] AT&T claims that LFAs have imposed obligations that franchisees collect, track, and report customer service performance data for individual franchise areas.[486] AT&T states that it operates its call centers and systems on a region-wide basis, and that it is not currently possible or economically feasible for AT&T to comply with the various local customer service requirements on a franchise by franchise basis.[487] AT&T also asks us to affirm that LFAs may not, absent the franchise applicant's consent, impose any local service quality standards that go beyond the requirements of duly enacted laws and ordinances.[488] Verizon indicates that some localities have conditioned the grant of a franchise upon the submission of Verizon's data services to local customer service regulation.[489]

142. NATOA opposes AT&T's request for

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[484] *Local Franchising NPRM*, 20 FCC Rcd at 18588.

[485] AT&T Comments at 72-73.

[486] *Id.*

[487] *Id.* As discussed in Section III.C.2 above, AT&T's existing call center regions do not mirror local franchise areas. One region can encompass multiple franchise areas, and impose a multitude of regulations upon a new entrant.

[488] AT&T Comments at 73.

[489] Verizon Comments at 75.

[490] Specifically, NATOA asserts that Section 632(d)(2) of the Cable Act allows for the establishment and enforcement of local customer service laws that go beyond the federal standards.[491] Other parties assert that customer service regulation is necessary to ensure that consumers have regulatory relief.[492]

143. Section 632(d)(2) states that:

> [n]othing in this Section shall be construed to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission . . . . Nothing in this Title shall be construed to prevent the establishment and enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under

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[490] NATOA Reply at 40-41. *See also* New York City Comments at 3 (citing 47 U.S.C. § 552).

[491] 47 U.S.C. § 552(d)(2). *Accord* 47 C.F.R. § 76.309(b)(4).

[492] *See, e.g.*, Alliance for Public Technology Comments at 2-3; American Association of People with Disabilities at 2; Cavalier Comments at 6.

> this section, or that addresses matters not addressed by the standards set by the Commission under this section.[493]

Given this explicit statutory language, we tentatively conclude that we cannot preempt state or local customer service laws that exceed the Commission's standards, nor can we prevent LFAs and cable operators from agreeing to more stringent standards. We seek comment on this tentative conclusion.

V. PROCEDURAL MATTERS

144. *Ex Parte Rules.* This is a permit-but-disclose notice and comment rulemaking proceeding. Ex Parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

145. *Comment Information.* Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on or before 30 days after this *Further Notice of Proposed Rulemaking* is published in the Federal Register, and reply comments on or before 45 days of publication. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.

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[493] 47 U.S.C. § 552(d)(2). *Accord* 47 C.F.R. § 76.309(b)(4).

See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.

    - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or

rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

146. *Initial Paperwork Reduction Act Analysis.* This *Further Notice of Proposed Rulemaking* does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

147. *Initial Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act,[494] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial *number* of small entities of the proposals addressed in this *Further*

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[494] *See* 5 U.S.C. § 603.

Notice of Proposed Rulemaking. The IRFA is set forth in Appendix C. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Second Further Notice*, and they should have a separate and distinct heading designating them as responses to the IRFA.

148. *Paperwork Reduction Act Analysis*. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we will seek specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

149. In this present document, we have assessed the effects of the application filing requirements used to calculate the time frame in which a local franchising authority shall make a decision, and find that those requirements will benefit companies with fewer than 25 employees by providing such companies with specific application requirements of a reasonable length. We anticipate this specificity will streamline this process for

companies with fewer than 25 employees, and that these requirements will not burden those companies.

150. *Final Regulatory Flexibility Analysis* As required by the Regulatory Flexibility Act,[495] the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this *Report and Order and Further Notice of Proposed Rulemaking.* The FRFA is set forth in Appendix D.

151. *Congressional Review Act.* The Commission will send a copy of this *Report and Order and Further Notice of Proposed Rulemaking* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

152. *Additional Information.* For additional information on this proceeding, please contact Holly Saurer, Media Bureau at (202) 418-2120, or Brendan Murray, Policy Division, Media Bureau at (202) 418-2120.

VI. ORDERING CLAUSES

153. IT IS ORDERED that, pursuant to the authority contained in Sections 1, 2, 4(i), 303, 303r, 403 and 405 of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 303(r), 403 , this *Report and Order and Further Notice of Proposed Rulemaking* IS ADOPTED.

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[495] *See* 5 U.S.C. § 604.

154. IT IS FURTHER ORDERED that pursuant to the authority contained in Sections Sections 1, 2, 4(i), 303, 303a, 303b, and 307 of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 303a, 303b, and 307, the Commission's rules ARE HEREBY AMENDED as set forth in Appendix B. It is our intention in adopting these rule changes that, if any provision of the rules is held invalid by any court of competent jurisdiction, the remaining provisions shall remain in effect to the fullest extent permitted by law.

155. IT IS FURTHER ORDERED that the rules contained herein SHALL BE EFFECTIVE 30 days after publication of the *Report and Order and Further Notice of Proposed Rulemaking* in the Federal Register, except for the rules that contain information collection requirements subject to the Paperwork Reduction Act, which shall become effective immediately upon announcement in the Federal Register of OMB approval.

156. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order and Further Notice of Proposed Rulemaking*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

157. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this *Report and Order and Further Notice of Proposed Rulemaking* in a report to be sent to Congress and the General

Accounting Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS
COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

List of Commenters and Reply Commenters

1. Abilene, TX
2. Access Channel 5, NY
3. Access Fort Wayne, IN
4. Access Sacramento, CA
5. Ad Hoc Telecom Manufacturer Coalition
6. Ada Township, et al.
7. Advance/Newhouse Communications
8. AEI-Brookings Joint Center for Regulatory Studies
9. Alamance County, NC
10. Albuquerque, NM
11. Alcatel
12. Alhambra, CA
13. Alliance for Public Technology
14. Alpina, MI
15. American Association of Business Persons with Disabilities
16. American Association of People with Disabilities
17. American Cable Association
18. American Consumer Institute
19. American Corn Growers Association
20. American Homeowners Grassroots Alliance
21. Anaheim, CA
22. Angels Camp, CA
23. Anne Arundel County, Carroll County, Charles County, Howard County and Montgomery County
24. Apex, NC

25. Apple Valley, MN
26. Appleton, WI
27. Archdale, NC
28. Arlington Independent Media, VA
29. Asheboro, NC
30. Ashland, KY
31. Ashokie, NC
32. Association of Independent Programming Networks
33. AT&T Inc.
34. Atascadero, CA
35. Bailey, NC
36. Banning, CA
37. Barrington, IL
38. Bellefonte, PA
39. Bellflower, CA
40. BellSouth
41. Benson, NC
42. Berks Community TV, PA
43. Beverly Hills, CA
44. Biddeford, ME
45. Billerica Access TV, MA
46. Billerica, MA
47. Birmingham Area Cable Board, MI
48. Blue Lake, CA
49. Bonita Springs, FL
50. Boston Community Access and Programming Foundation (BCAPF)
51. Boston, MA
52. Bowie, MD
53. Branford Commun. TV, CT
54. Brea, CA

55. Brisbane, CA
56. Broadband Service Providers Association
57. Brunswick, ME
58. Bucks County Consortium of Communities, PA
59. Burlington, NC
60. Burnsville/Eagan Telecommunications Commission; The City of Minneapolis, MN; The North Metro Telecommunications Commission; The North Suburban Communications Commission; and The South Washington County Telecommunications Commission ("City of Minneapolis")
61. Cable Access St. Paul, MN
62. Cable Advisory Council of South Central CT
63. Cablevision Systems Corporation
64. Cadillac, MI
65. Calabash, NC
66. California Alliance for Consumer Protection
67. California Farmers Union
68. California Small Business Association
69. California Small Business Roundtable
70. Cambridge Public Access Corp, MA
71. Cambridge, MA
72. Campbell County Cable Board, KY
73. Cape Coral, FL
74. Capital Community TV, OR
75. Carlsbad, CA
76. Carrboro, NC
77. Cary, NC
78. Castalia, NC
79. Caswell County, NC
80. Cavalier Telephone, LLC/Cavalier IP TV, LLC

81. Cedar Rapids, Iowa
82. Center for Digital Democracy
83. Central St. Croix Valley Joint Cable Comm, MN
84. Certain Florida Municipalities
85. Champaign, IL
86. Champaign-Urbana Cable TV and Telecomm Commission, IL
87. Chapel Hill, NC
88. Charlotte, NC
89. Charter Communications, Inc.
90. Chicago Access Corp, IL
91. Chicago, IL
92. Cincinnati Bell, Inc.
93. Cincinnati, OH
94. Citizen's Community TV, CO
95. City and County of San Francisco, CA
96. City of Los Angeles
97. City of Philadelphia
98. City of St. Louis, Missouri
99. City of Ventura, California
100. Clackamas County, OR
101. Clark County, NV
102. Clay County, FL
103. Clayton, NC
104. Clinton Township, MI
105. Clovis, CA
106. College Twp, PA
107. Comcast Corporation
108. Communications Support Group, Inc.
109. Community Access TV, IL
110. Community Programming Board of Forest Park et al, OH

111. Concord, CA
112. Concord, NC
113. Consumer Coalition of California
114. Consumer Electronics Association
115. Consumers First
116. Consumers for Cable Choice
117. Coral Springs, Florida
118. Coralville, IA
119. Coronado, CA
120. Cox Communications, Inc.
121. Cypress, CA
122. Daly City, CA
123. Dare County, NC
124. Darlington, SC
125. Davis, CA
126. Del Mar, CA
127. Delray Beach, FL
128. Democratic Processes Center
129. Discovery Institute's Technology & Democracy Project
130. Dortches, NC
131. Dublin, CA
132. Durham, NC
133. Eden, NC
134. El Cerrito, CA
135. Elk Grove, IL
136. Elon, NC*
137. Enumclaw, WA
138. Escondido, CA
139. Esopus, NY
140. Evanston, IL
141. Fairfax Cable Access, VA

142. Fairfax County, Virginia
143. Fairfax, CA
144. Faith, NC
145. Fall River Community TV, MA
146. Fargo, ND
147. Farmington, MN
148. Ferguson, PA
149. Ferndale, CA
150. Fiber-to-the-Home Council
151. Floral Park, NY
152. Florence, Kentucky
153. Florence, KY
154. Fort Worth, TX
155. Fortuna, CA
156. Foster City, CA
157. Foxboro Cable Access, MA
158. Franklin Lakes, NJ
159. Franklin, KY
160. Free Enterprise Fund
161. Free Press (Reply)
162. Free Press, Consumers Union, Consumer Federation of America
163. Freedomworks
164. Ft. Lauderdale, FL
165. Gainesville, FL
166. Garland, TX
167. Garner, NC
168. Geneva, IL
169. Georgia Municipal Association (GMA)
170. Gibsonville, NC
171. Gilroy, CA
172. Glenview, IL

173. Graham, NC
174. Grand Rapids, MI
175. Granite Quarry, NC
176. Great Neck/North Shore Cable Comm'n, NY
177. Greater Metro Telecommunications Consortium, et al. (GMTC)
178. Green Spring, K
179. Greensboro, NC*
180. Greenville, NC
181. Guilford County, NC
182. Harnett County, NC
183. Harris Township, PA
184. Haw River, NC
185. Hawaii Consumers
186. Hawaii Telcom Communications, Inc.
187. Henderson County, NC
188. Henderson, NV
189. Hialeah, FL
190. Hibbing Public Access TV, MN
191. High Point, NC
192. High Tech Broadband Coalition
193. Highlands, NC
194. Hillsborough, NC
195. Holly Springs, NC
196. Huntsville, AL
197. Imperial Beach, CA
198. Independent Multi-Family Communications Council
199. Indianapolis, IN
200. Institute for Policy Innovation
201. Intergovernmental Cable Comm Auth, MI
202. Iowa City, IA

203. Irvine, CA
204. Irwindale, CA
205. Itasca Comm TV, MN
206. Jackson, CA
207. Jamestown, NC
208. Jefferson County League of Cities Cable Comm'n, Kentucky
209. Jenkins, KY
210. Jersey Access Group, NJ
211. Kansas City, Missouri
212. Kernersville, NC
213. Killeen, TX
214. King County, WA
215. Kitty Hawk, NC
216. Knightdale, NC
217. La Puente, CA
218. Lake Forest, CA
219. Lake Lurie, NC
220. Lake Mills, WI
221. Lake Minnetonka Communications Comm, MN
222. Lake Worth, FL
223. Lakewood, CA
224. Las Vegas, NV
225. LaVerne, CA
226. League of Minnesota Cities (LMC)
227. League of United Latin American Citizens of the Northeast Region+
228. Leavenworth, KS
229. Lee County, FL
230. Leibowitz & Associates, P.A.
231. Lenexa, KS
232. Lewisville, NC

233. Lexington, NC
234. Lincoln, CA
235. Lincoln, NE
236. Long Beach, CA
237. Longmont, CO
238. Loomis, CA
239. Los Angeles Cable Televisión Access Corp., CA
240. Los Banos, CA
241. Lynwood, CA
242. Madison Hts, MI
243. Madison, NC
244. Madison, WI
245. Malverne, NY
246. Manatee County, Florida
247. Manhattan Community Access Corp., NY
248. Marin Telecomm Agency, CA
249. Martha's Vineyard Comm TV, MA
250. Maxton, NC
251. Mayodan, NC
252. Mayville, NY
253. Maywood, CA
254. Mecklenburg County, NC
255. Medford, OR
256. Medford, OR
257. Media Action Marin, CA
258. Media Bridges Cincinnati, OH
259. Mercatus Center
260. Metheun Comm TV, MA
261. Metropolitan Area Comm Comm'n, OR
262. Metropolitan Educational Access Corp, TN
263. Miami Valley Comm Council, OH
264. Miami-Dade County, Florida

265. Michigan Municipal League
266. Microsoft Corporation
267. Middlesex, NC
268. Midland, TX
269. Milpitas, CA
270. Minnesota Telecomm Alliance
271. Minority Media and Telecommunications Council, et al.
272. Missouri Chapter – National Association of Telecommunications Officers and Advisors (MO-NATOA)
273. Mobile, AL
274. Momeyer, NC
275. Monrovia, CA
276. Monterey Park, CA
277. Montrose, CO
278. Morrisville, NC
279. Mount Morris, MI
280. Mt. Hood Cable Regulatory Commission (MHCRC)
281. Murfeesboro, TN
282. Murfreesboro, NC
283. Murrieta, CA
284. National Association of Broadcasters
285. National Black Chamber of Commerce
286. National Cable & Telecommunications Association
287. National Caucus and Center on Black Aged
288. National Grange
289. National Hispanic Council on Aging
290. National Taxpayers Union

291. National Telecommunications Cooperative Association
292. NATOA, NLC, NACO, USCM, ACM, and ACD
293. Naval Media Center, US
294. New Jersey Board of Public Utilities (NJBPU)
295. New Jersey Division of the Ratepayer Advocate
296. New York City
297. New York State Conference of Mayors (NYCOM)
298. Newton Comm Access Cntr, MA
299. Norfolk, VA
300. North Kansas City, MO
301. North Liberty, IA
302. North Richland Hills, TX
303. Northbrook, IL
304. Northern Berkshire Comm TV Corp, MA
305. Northern Dakota County Cable Comm Comm'm
306. Northwest Suburbs Cable Commun Comm'n, MN
307. Norwalk, CA
308. Oceanside Comm TV, CA
309. Onslow Cnty, NC
310. Ontario, CA
311. Orange County, FL
312. Organization for the Promotion and Advancement of Small Telecommunications Companies
313. Orion Neighborhood TV, MI
314. Oxford, NC
315. Pacific Research Institute
316. Pac-West Telecomm, Inc.
317. Palmetto, FL

318. Palo Alto, CA (on behalf of Joint Powers)
319. Pasadena, CA
320. Patton, PA
321. Peachtree City, GA
322. Pennsville, NJ
323. Perris, CA
324. Philadelphia, PA
325. Pike County, Kentucky
326. Pike County, KY
327. Pikeville, Kentucky
328. Pikeville, KY
329. Pinetops, NC
330. Pittsboro, NC
331. Plainfield, MI
332. Pleasant Garden, NC
333. Pleasant Hill, CA
334. Plymouth, MA
335. Pocatello, ID
336. Post Falls, ID
337. Poway, CA
338. Prince George's Community TV, Inc.
339. Prince George's County, MD
340. Princeton Community TV, NJ
341. Public Cable Television Authority
342. Public Utility Commission of Texas
343. Public, Educational and Government Access Oversight Comm of Metro Nashville
344. Queen Anne's County, MD
345. Quote Unquote, NM
346. Qwest Communications International Inc.
347. Ramsey/Washington Counties Suburban Cable Commun. Comm'n, MN

348. Rancho Cordova, CA
349. Rancho Santa Margarita, CA
350. Randolph County, NC
351. RCN Telecom Services, Inc.
352. Red Oak, NC
353. Redding, CA
354. Reidsville, NC
355. Renton, WA
356. Richmond, KY
357. River Bend, NC
358. Rockingham County, NC
359. Rockwell, NC
360. Rolling Hills Estates, CA
361. Rowan County, NC
362. Sacramento Metro Cable TV Commission, CA
363. Saint Charles, MO
364. Salem, OR
365. Salt Lake City, UT
366. San Diego, CA
367. San Dimas, CA
368. San Jose, CA
369. San Juan Capistrano, CA
370. San Marcos, CA
371. San Mateo County Telecomm Auth, CA
372. Sanford, NC
373. Santa Clara, CA
374. Santa Clarita, CA
375. Santa Cruz County Community TV
376. Santa Rosa, CA
377. Santee, CA
378. Saratoga Springs, NY
379. Scotts Valley, CA

380. Seattle, WA
381. Sebastopol, CA
382. Self-Advocacy Association of New York State, Inc.
383. Shaler, PA
384. Sierra Madre, CA
385. Signal Hill, CA
386. Siler City, NC
387. Simi Valley, CA
388. Sjoberg's, Inc.
389. Skokie, IL
390. Smithfield, NC
391. Solana Beach, CA
392. South Orange Village, NJ
393. South Portland, ME
394. South San Francisco, CA
395. South Slope Cooperative Telephone Company
396. Southeast Michigan Municipalities
397. Southwest Suburban Cable Commission (SWSCC)
398. Spring Hope, NC
399. Springfield, MO
400. St. Charles, IL
401. St. Paul, MN*
402. St. Petersburg, FL
403. Standish, ME
404. State College Bourough, PA
405. State of Hawaii
406. Statesville, NC
407. Sun Prairie Cable Access TV, WI
408. Sunapee, NH*
409. Sunnyvale, CA

410. Susanville, CA
411. Tabor City, NC
412. Tampa, FL
413. Taylor, MI
414. Telco Retirees Association, Inc.
415. Telecommunications Industry Association
416. Temecula, CA
417. Texas Coalition of Cities for Utility Issues (TCCFUI)
418. Texas Municipal League and the Texas City Attorneys Association
419. The Progress & Freedom Foundation
420. Time Warner Cable
421. Tobaccoville, NC
422. Toppenish, WA
423. Torrance, CA
424. Truckee, CA
425. Tulsa, OK
426. Tuolumne, CA
427. Ukiah, CA
428. United States Internet Industry Association
429. United States Telecom Association
430. United States-Mexico Chamber of Commerce
431. URTV Asheville, NC
432. Valley Voters Organized Toward Empowerment
433. Vancouver Educational Telecommunications Consortium (VETC)
434. Vass, NC
435. Verizon
436. Vermont Public Service Board (VPSB)
437. Video Access Alliance
438. Villages of Larchmont & Mamaroneck, NY

439. Virginia Cable Telecommunications Association (VCTA)
440. Vista, CA
441. Wake Forest, NC
442. Walnut Creek, CA
443. Walnut Creek, California
444. Warrenville, IL
445. Washington State Grange
446. Wayland, MA
447. Wendell, NC
448. West Allis, WI
449. West Palm Beach, FL
450. Westport, WI
451. Wheaton, IL
452. Whitakers, NC
453. White Plains Cable Access TV, NY
454. White, SD
455. Whittier, CA
456. Wilbraham, MA
457. Wilson, NC
458. Winchester, KY & KY Regional Cable Comm.
459. Windham Community TV, NH
460. Winston-Salem, NC
461. Wisconsin Association of Public, Educational and Government Access Channels (WAPC)
462. Women Impacting Public Policy
463. Worchester, MA
464. World Institute on Disability
465. Yanceyville, NC
466. Yuma, AZ
467. Zebulon, NC
468. Zeeland, MI

APPENDIX B

Rule Changes

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 76 –MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. Revise Subpart C title to read as follows:

Subpart C – Cable Franchise Applications

2. Insert into new Subpart C the following:

§76.41 Franchise Application Process

(a) Definition. *Competitive Franchise Applicant.* For the purpose of this section, an applicant for a cable franchise in an area currently served by another cable operator or cable operators in accordance with 47 U.S.C. § 541(a)(1).

(b) A competitive franchise applicant must include the following information in writing in its franchise application, in addition to any information required by applicable state and local laws:

(1) the applicant's name;

(2) the names of the applicant's officers and directors;

(3) the business address of the applicant;

(4) the name and contact information of a designated contact for the applicant;

(5) a description of the geographic area that the applicant proposes to serve;

(6) the PEG channel capacity and capital support proposed by the applicant;

(7) the term of the agreement proposed by the applicant;

(8) whether the applicant holds an existing authorization to access the public rights-of-way in the subject franchise service area as described under subsection (b)(5);

(9) the amount of the franchise fee the applicant offers to pay; and

(10) any additional information required by applicable state or local laws.

(c) A franchising authority may not require a competitive franchise applicant to negotiate or engage in any regulatory or administrative processes prior to the filing of the application.

(d) When a competitive franchise applicant files a franchise application with a franchising authority and the applicant has existing authority to access public rights-of-way in the geographic area that the applicant proposes to serve, the franchising authority must grant or deny the application within 90 days of the date the application is received by the franchising authority. If a competitive franchise

applicant does not have existing authority to access public rights-of-way in the geographic area that the applicant proposes to serve, the franchising authority must grant or deny the application within 180 days of the date the application is received by the franchising authority. A franchising authority and a competitive franchise applicant may agree in writing to extend the 90-day or 180-day deadline, whichever is applicable.

e) If a franchising authority does not grant or deny an application within the time limit specified in subsection (d), the competitive franchise applicant will be authorized to offer service pursuant to an interim franchise in accordance with the terms of the application submitted under subsection (b).

f) If after expiration of the time limit specified in subsection (d) a franchising authority denies an application, the competitive franchise applicant must discontinue operating under the interim franchise specified in subsection (e) unless the franchising authority provides consent for the interim franchise to continue for a limited period of time, such as during the period when judicial review of the franchising authority's decision is pending. The competitive franchise applicant may seek judicial review of the denial under 47 U.S.C. § 555.

g) If after expiration of the time limit specified in subsection (d) a franchising authority and a competitive franchise applicant agree on the terms of

a franchise, upon the effective date of that franchise, that franchise will govern and the interim franchise will expire.

APPENDIX C

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (the "RFA"),[1] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact of the policies and rules proposed in the *Further Notice of Proposed Rulemaking* ("*Further Notice*") on a substantial number of small entities.[2] Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Further Notice* provided in paragraph 145 of the item. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[3] In addition, the *Further Notice* and IRFA

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[1] The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603. Although we are conducting an IRFA at this stage in the process, it is foreseeable that ultimately we will certify this action pursuant to the RFA, 5 U.S.C. § 605(b), because we anticipate at this time that any rules adopted pursuant to this *Notice* will have no significant economic impact on a substantial number of small entities.

[3] *See* 5 U.S.C. § 603(a).

(or summaries thereof) will be published in the Federal Register.[4]

A. Need for, and Objectives of, the Proposed Rules

2. The *Further Notice* continues a process to implement Section 621(a)(1) of the Communications Act of 1934, as amended, in order to further the interrelated goals of enhanced cable competition and accelerated broadband deployment as discussed in the *Report and Order* ("*Order*"). Specifically, the *Further Notice* solicits comment on whether the Commission should apply the rules and guidelines adopted in the *Order* to cable operators that have existing franchise agreements, and if so, whether the Commission has authority to do so. The *Further Notice* also seeks comment on whether the Commission can preempt state or local customer service laws that exceed Commission standards.

B. Legal Basis

3. The *Further Notice* tentatively concludes that the Commission has authority to apply the findings in the *Order* to cable operators with existing franchise agreements. In that regard, the *Further Notice* finds that neither Section 611(a) nor Section 622(a) distinguishes between incumbents and new entrants or franchises issued to incumbents and franchises issued to new entrants.[5]

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[4] *See* 5 U.S.C. § 603(a).

[5] *See* 47 U.S.C. §§ 531(a), 542(a).

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[6] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[7] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[8] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[9]

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[6] 5 U.S.C. § 603(b)(3).

[7] 5 U.S.C. § 601(6).

[8] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[9] 15 U.S.C. § 632.

5. *Small Businesses.* Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.[10]

6. *Small Organizations.* Nationwide, there are approximately 1.6 million small organizations.[11]

7. The Commission has determined that the group of small entities possibly directly affected by the proposed rules herein, if adopted, consists of small governmental entities. A description of these entities is provided below. In addition the Commission voluntarily provides descriptions of a number of entities that may be merely indirectly affected by any rules that result from the *Further Notice.*

Small Governmental Jurisdictions

8. The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[12] As of 1997, there were approximately 87,453 governmental jurisdictions in the United

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[10] *See* SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

[11] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[12] 5 U.S.C. § 601(5).

States.[13] This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2 percent) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

Miscellaneous Entities

9. The entities described in this section are affected merely indirectly by our current action, and therefore are not formally a part of this RFA analysis. We have included them, however, to broaden the record in this proceeding and to alert them to our tentative conclusions.

Cable Operators

10. The "Cable and Other Program Distribution" census category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating $13.0 million or less in revenue annually.[14] According to Census Bureau data for

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[13] U.S. Census Bureau, Statistical Abstract of the United States: 2000, Section 9, pages 299-300, Tables 490 and 492.

[14] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) 517510.

1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.[15] Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

11. *Cable System Operators (Rate Regulation Standard).* The Commission has developed its own small-business-size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[16] The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.[17] Since then, some of those companies may

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[15] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513220 (issued October 2000).

[16] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. *See Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995).

[17] Paul Kagan Associates, Inc., Cable TV Investor, February 29, 1996 (based on figures for December 30, 1995).

have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

12. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[18] The Commission has determined that there are 67,700,000 subscribers in the United States.[19] Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[20] Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer,

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[18] 47 U.S.C. § 543(m)(2).

[19] *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice DA 01-158 (2001).

[20] 47 C.F.R. § 76.901(f).

totals 1,450.[21] The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[22] and therefore is unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

13. *Open Video Services.* Open Video Service ("OVS") systems provide subscription services.[23] As noted above, the SBA has created a small business size standard for Cable and Other Program Distribution.[24] This standard provides that a small entity is one with $13.0 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of these are currently providing service.[25]

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[21] *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operators, Public Notice, DA 01-0158 (2001).

[22] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

[23] *See* 47 U.S.C. § 573.

[24] 13 C.F.R. § 121.201, NAICS code 517510.

[25] *See* http://www.fcc.gov/mb/ovs/csovscer.html (visited December 19, 2006), http://www.fcc.gov/mb/ovs/csovsarc.html (visited December 19, 2006).

Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 24 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

14. We anticipate that any rules that result from this action would have at most a *de minimis* impact on small governmental jurisdictions (*e.g.*, one-time proceedings to amend existing procedures regarding the method of granting competitive franchises). Local franchising authorities ("LFAs") today must review and decide upon competitive cable franchise applications, and will continue to perform that role upon the conclusion of this proceeding; any rules that might be adopted pursuant to this *Notice* likely would require at most only modifications to that process.

E. Steps Taken to Minimize Significant Economic Impact on

Small Entities and Significant Alternatives Considered

15. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[26]

16. As discussed in the *Further Notice*, Sections 611(a) and 622(a) do not distinguish between new entrants and cable operators with existing franchises.[27] As discussed in the *Order*, the Commission has the authority to implement the mandate of Section 621(a)(1) to ensure that LFAs do not unreasonably refuse to award competitive franchises to new entrants, and adopts rules designed to ensure that the local franchising process does not create unreasonable barriers to competitive entry for new entrants. Such rules consist of specific

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[26] 5 U.S.C. §§ 603(c)(1)-(4).

[27] 47 U.S.C. §§ 531(a), 542(a).

guidelines (*e.g.*, maximum timeframes for considering a competitive franchise application) and general principles regarding franchise fees designed to provide LFAs with the guidance necessary to conform their behavior to the directive of Section 621(a)(1). As noted above, applying these rules regarding the franchising process to cable operators with existing franchises likely would have at most a *de minimis* impact on small governmental jurisdictions. Even if that were not the case, however, we believe that the interest of fairness to those cable operators would outweigh any impact on small entities. The alternative (*i.e.*, continuing to allow LFAs to follow procedures that are unreasonable) would be unacceptable, as it would be inconsistent with the Communications Act. We seek comment on the impact that such rules might have on small entities, and on what effect alternative rules would have on those entities. We also invite comment on ways in which the Commission might implement the tentative conclusions while at the same time imposing lesser burdens on small entities.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

17. None.

APPENDIX D

Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice of Proposed Rulemaking* ("*NPRM*") to this proceeding.[2] The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. The Commission received one comment on the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[3]

A. Need for, and Objectives of, the Report and Order

2. This Report and Order ("*Order*") adopts rules and provides guidance to implement Section 621 of the Communications Act of 1934, as amended

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

[2] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 20 FCC Rcd 18581 (2005) ("*NPRM*").

[3] *See* 5 U.S.C. § 604.

(the "Communications Act").[4] Section 621 of the Communications Act prohibits franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services.[5] The Commission has found that the current franchising process constitutes an unreasonable barrier to entry for competitive entrants that impedes enhanced cable competition and accelerated broadband deployment. The Commission also has determined that it has authority to address this problem. To eliminate the unreasonable barriers to entry into the cable market, and to encourage investment in broadband facilities, in this *Order* the Commission (1) adopts maximum time frames within which local franchising authorities ("LFAs") must grant or deny franchise applications (90 days for new entrants with existing access to rights-of-way and six months for those who do not); (2) prohibits LFAs from imposing unreasonable build-out requirements on new entrants; (3) identifies certain costs, fees, and other compensation which, if required by LFAs, must be counted toward the statutory 5 percent cap on franchise fees; (4) interprets new entrants' obligations to provide support for PEG channels and facilities and institutional networks ("I-Nets"); and (5) clarifies that LFA authority is limited to regulation of cable services, not mixed-use services.

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[4] 47 U.S.C. § 541(a)(1).

[5] *Id.*

The Commission also preempts local laws, regulations, and franchise agreement requirements, including level-playing-field provisions, to the extent they impose greater restrictions on market entry for competitive entrants than what the *Order* allows. The rule and guidelines are adopted in order to further the interrelated goals of enhanced cable competition and accelerated broadband deployment. For the specific language of the rule adopted, see Appendix B.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

3. Only one commenter, Sjoberg's, Inc. submitted a comment that specifically responded to the IRFA. Sjoberg's, Inc. contends that small cable operators are directly affected by the adoption of rules that treat competitive cable entrants more favorably than incumbents. Sjoberg's Inc. argues that small cable operators are not in a position to compete with large potential competitors. These arguments were considered and rejected as discussed below.

4. We disagree with Sjoberg's Inc. assertion that our rules will treat competitive cable entrants more favorably than incumbents. While the actions we take in the *Order* will serve to increase competition in the multichannel video programming ("MVPD") market, we do not believe that the rules we adopt in the *Order* will put any incumbent provider at a competitive disadvantage.

In fact, we believe that incumbent cable operators are at a competitive advantage in the MVPD market; incumbent cable operators have the competitive advantage of an existing customer base and significant brand recognition in their existing markets. Furthermore, we ask in the *Further Notice of Proposed Rulemaking* whether the findings adopted in the *Order* should apply to existing cable operators and tentatively conclude that they should.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

Entities Directly Affected By Proposed Rules

5. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.[6] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small government jurisdiction."[7] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[8] A small

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[6] 5 U.S.C. § 603(b)(3).

[7] *Id.* § 601(6).

[8] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of (continued)

business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[9]

6. The rules adopted by this *Order* will streamline the local franchising process by adopting rules that provide guidance as to what constitutes an unreasonable refusal to grant a cable franchise. The Commission has determined that the group of small entities directly affected by the rules adopted herein consists of small governmental entities (which, in some cases, may be represented in the local franchising process by not-for-profit enterprises). Therefore, in this FRFA, we consider the impact of the rules on small governmental entities. A description of such small entities, as well as an estimate of the number of such small entities, is provided below.

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Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[9] 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

7. *Small governmental jurisdictions.* Small governmental jurisdictions are "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[10] As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.[11] This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2 percent) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer.

Miscellaneous Entities

8. The entities described in this section are affected merely indirectly by our current action, and therefore are not formally a part of this RFA analysis. We have included them, however, to broaden the record in this proceeding and to alert them to our conclusions.

Cable Operators

9. The "Cable and Other Program Distribution" census category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and

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[10] 5 U.S.C. § 601(5).

[11] U.S. Census Bureau, Statistical Abstract of the United States: 2000, Section 9, pages 299-300, Tables 490 and 492.

subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating $13.0 million or less in revenue annually.[12] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.[13] Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

10. Cable System Operators (Rate Regulation Standard). The Commission has developed its own small-business-size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[14] The most recent estimates

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[12] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517510.

[13] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513220 (issued October 2000).

[14] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. *See Implementation of Sections of the 1992 Cable Act: Rate*

(continued)

indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.[15] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

11. Cable System Operators (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[16] The Commission has determined that there are 67,700,000 subscribers in the United States.[17] Therefore, an operator serving fewer than 677,000 subscribers

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Regulation, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393 (1995).

[15] Paul Kagan Associates, Inc., Cable TV Investor, February 29, 1996 (based on figures for December 30, 1995).

[16] 47 U.S.C. § 543(m)(2).

[17] *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice DA 01-158 (2001).

shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[18] Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450.[19] The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[20] and therefore is unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

12. Open Video Services. Open Video Service ("OVS") systems provide subscription services.[21] As noted above, the SBA has created a small business size standard for Cable and Other Program Distribution.[22] This standard provides that

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[18] 47 C.F.R. § 76.901(f).

[19] *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operators, Public Notice, DA 01-0158 (2001).

[20] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.909(b).

[21] *See* 47 U.S.C. § 573.

[22] 13 C.F.R. § 121.201, NAICS code 517510.

a small entity is one with $13.0 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of these are currently providing service.[23] Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 24 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

Telecommunications Service Entities

13. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[24] The SBA's Office of Advocacy contends

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[23] *See* http://www.fcc.gov/mb/ovs/csovscer.html (visited December 19, 2006), http://www.fcc.gov/mb/ovs/csovsarc.html (visited December 19, 2006).

[24] 15 U.S.C. § 632.

that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[25] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

14. *Incumbent Local Exchange Carriers ("LECs").* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[26] According to Commission data,[27] 1,303 carriers have reported

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[25] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

[26] 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

[27] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (June 2005) ("Trends in Telephone Service"). This source uses data that are current as of October 1, 2004.

that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[28]

15. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has

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[28] *See* U.S. Census Bureau, 2002 Economic Census, Industry Series: "Information," Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513310 (issued Nov. 2004). The preliminary data indicate that the total number of "establishments" increased from 20,815 to 27, 891. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

1,500 or fewer employees.[29] According to Commission data,[30] 769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 93 have more than 1,500 employees. In addition, 12 carriers have reported that they are "Shared-Tenant Service Providers," and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are "Other Local Service Providers." Of the 39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.[31]

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[29] 13 C.F.R. § 121.201, NAICS code 517110.

[30] "Trends in Telephone Service" at Table 5.3.

[31] *See supra* note 28.

D. Description of Projected Reporting, Record Keeping and other Compliance Requirements

16. The rule and guidance adopted in the *Order* will require *de minimus* additional reporting, record keeping, and other compliance requirements. The most significant change requires potential franchisees to file an application to mark the beginning of the franchise negotiation process. This filing requires minimal information, and we estimate that the average burden on applicants to complete this application is one hour. The franchising authority will review this application in the normal course of its franchising procedures. The rule will not require any additional special skills beyond any already needed in the cable franchising context.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

17. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from

coverage of the rule, or any part thereof, for small entities.[32]

18. In the *NPRM*, the Commission sought comment on the impact that rules interpreting Section 621(a)(1) might have on small entities, and on what effect alternative rules would have on those entities. The Commission also invited comment on ways in which the Commission might implement Section 621(a)(1) while at the same time impose lesser burdens on small entities. The Commission tentatively concluded that any rules likely would have at most a *de minimis* impact on small governmental jurisdictions, and that the interrelated, high-priority federal communications policy goals of enhanced cable competition and accelerated broadband deployment necessitated the establishment of specific guidelines for LFAs with respect to the process by which they grant competitive cable franchises. We agree with those tentative conclusions, and we believe that the rules adopted in the *Order* will not impose a significant impact on any small entity.

19. In the *Order*, we provide that LFAs should reasonably review franchise applications within 90 days for entities existing authority to access rights-of way, and within six months for entities that do not have such authority. This will result in decreasing the regulatory burdens on cable operators. We declined to adopt shorter deadlines

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[32] 5 U.S.C. § 603(c)(1)-(c)(4)

that commenters proposed (*e.g.*, 17 days, one month) in order to provide small entities more flexibility in scheduling their franchise negotiation sessions. In the *Order*, we also provide guidance on whether an LFA may reasonably refuse to award a competitive franchise based on certain franchise requirements, such as build-out requirements and franchise fees. As an alternative, we considered providing no guidance on any franchising terms. We conclude that the guidance we provide minimizes any adverse impact on small entities because it clarifies the terms within which parties must negotiate, and should prevent small entities from facing costly litigation over those terms.

F. Report to Congress

20. The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress pursuant to the *Small* Business Regulatory Enforcement Fairness Act of 1996.[33] In addition, the Commission will send a copy of the *Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the Federal Register.[34]

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[33] *See* 5 U.S.C. § 801(a)(1)(A).

[34] *See id.* § 604(b).

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 (MB Docket No. 05-311)

Greater competition in the market for the delivery for multichannel video programming is a primary and long-standing goal of federal communications policy. In passing the 1992 Cable Act, Congress recognized that competition between multiple cable systems would be beneficial, would help lower cable rates, and specifically encouraged local franchising authorities to award competitive franchises. Section 621 of the statute reads, "A franchising authority may not grant an exclusive franchise and *may not unreasonably refuse to award an additional competitive franchise*."

Telephone companies are investing billions of dollars to upgrade their networks to provide video. As new providers began actively seeking entry into video markets, we began to hear that some local authorities were making the process of getting franchises unreasonably difficult, despite clear statutory language. The record collected by the Commission in this proceeding cited instances where LFAs sat on applications for more than a year or required extraordinary in kind contributions such as

the building of public swimming pools and recreation centers.

Such unreasonable requirements are especially troubling because competition is desperately needed in the video market. As we just found, from 1995 to 2005, cable rates have risen 93%. In 1995 cable cost $22.37 per month. Last year, cable cost $43.04 per month. Today's Communications Daily reports that prices for expanded basic are now about $50 per month. The trend in pricing of cable services is of particular importance to consumers. Since 1996 the prices of every other communications service have declined while cable rates have risen year after year after year.

This item appropriately removes such regulatory barriers by giving meaning to the words Congress wrote in section 621 of the Cable Act. Specifically, the Commission finds that an LFA is unreasonably refusing to grant a competitive franchise when it does not act on an application within a reasonable time period, imposes taxes on non-cable services such as broadband, requires a new entrant to provide unrelated services or imposes unreasonable build-out requirements.

The widespread deployment of broadband remains my top priority as Chairman and a major Commission objective. During my tenure as Chairman, the Commission has worked hard to

create a regulatory environment that promotes broadband deployment. We have removed legacy regulations, like tariffs and price controls, that discourage carriers from investing in their broadband networks, and we worked to create a regulatory level playing-field among broadband platforms. And we have begun to see some success as a result of the Commission's policies. High-speed connections to the Internet have grown over 400% since I became Commissioner in July 200.

The ability to deploy broadband networks rapidly however, is intrinsically linked to the ability to offer video to consumers. As the Commission stated in the Notice in this proceeding: "The construction of modern telecommunications facilities requires substantial capital investment and such networks, once completed, are capable of providing not only voice and data, but video as well. As a consequence, the ability to offer video offers the promise of an additional revenue stream from which deployment costs can be recovered."

Similarly, in a 2005 Policy Paper, the Phoenix Center found that video is "is now the key driver for new fiber deployment in the residential market." The Phoenix Center went on to say that: "If a new entrant cannot readily provide consumers multichannel video over an advanced network, then the prospects for success will be diminished substantially due to a reduction in the entrant's potential revenues. Quite simply, the ability to sell

video services over these fiber networks may be a crucial factor in getting those fiber networks deployed." By enhancing the ability of new entrants to provide video services then we are advancing our goal of universal affordable broadband access for Americans, as well as our goal of increased video competition.

I am also committed to seeing that consumers are able to realize the benefits of competition in the forms of better services and lower prices. In recent years however, consumers have had limited choice among video services providers and ever increasing prices for those services. But as was just demonstrated in our annual price survey, cable competition can impact cable bills. Again, it found that only in areas where there was competition from a second cable operator did average price for cable service decrease. I am pleased that the steps taken by the Commission today will expressly further this type of competition and help ensure that lower prices are available to as many Americans as possible as quickly as possible.

Addressing build-out requirements was particularly difficult. This item seeks to strike a balance between encouraging as widespread deployment of broadband as possible while not deterring entry altogether. I believed it would have been appropriate to provide examples of build-out

requirements that would be reasonable in addition to illustrating those that could not be.[1]

[1] For example, I would have been willing to find that it would seem reasonable for an LFA to require that, beginning five years after the effective date of a new entrant's franchise and every 3 years thereafter, if in the portion of the franchise area where the new entrant has chosen to offer cable service at least 15 percent of the households subscribe to such service, the new entrant increase by 20 percent the households in the franchise area to which the new entrant offers cable service by the beginning of the next 3-year interval, until the new entrant is capable of providing cable service to all households in the franchise area.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 (MB Docket No. 05-311)

I think that all of my colleagues and I can agree on the central importance of encouraging video competition. It is abundantly clear that cable rates are rising faster than inflation and that wireline cable competition can be helpful in bringing those rates down. Consumers deserve rules that will bring such competition to their doorsteps because consumers are not being well-served by the lack of competition today.

I think my colleagues and I can also agree on the central importance of broadband deployment. As I have often pointed out, our nation is falling behind in the international broadband race. Encouraging new entrants into the video market could at least assist in the challenge of building out broadband infrastructure, although it doesn't represent anything near the totality of what a real broadband strategy would look like.

But agreeing on the many benefits of video competition is hardly the same thing as coming up with rules that will actually encourage honest-to-

goodness competition within the framework of the statutes that Congress has given us. The item before us today doesn't get us there and I cannot support it as written.

In recent days we had discussions attempting to craft an item with which I would feel more comfortable. Chairman Martin engaged in those discussions in good faith and I thank him for that. My goal was to encourage an item that preserves a local authority's statutory right to seek specific and far-reaching build-out requirements, protects each community's ability to negotiate for PEG and I-NET facilities, and maintains truly meaningful local ability to deal with the huge companies that are coming into our cities and towns to build important infrastructure.

Throughout the consideration of this item and even as we discussed ways to improve it in recent days, I have been troubled at the lack of a granular record that would demonstrate that the present franchising system is irretrievably broken and that traditional federal-state-local relationships have to be so thoroughly upended. If we are going to preempt and upend the balances inherent in long-standing federal-state-local jurisdictional authorities, we should have a record clearly demonstrating that those local authorities are not up to the task of handling this infrastructure build-out and that competition can be introduced only by preempting and upsetting these long-standing

principles of federalism. My colleagues may recall that when we launched the NPRM on this item, I made it very clear how important the compilation of a compelling granular record would be in my consideration of this proceeding. I do not believe that either today's item or the record behind it makes such a showing. The various examples of "unreasonable" franchise requirements that the item enumerates are not closely or carefully supported by the record and often fail to rise beyond isolated episodes or anecdotal evidence.

Many people questioned, and continue to question, the Commission's legal authority to do what it is doing today. It is clear that those questions remain and that the Commission has been asked by those with oversight powers to more conclusively demonstrate our authority to undertake the actions we initiate today. I believe it is the better course of wisdom in so far-reaching a proceeding, in light of the concern being expressed by those with oversight responsibilities of this Commission, to thoroughly answer those questions, to lay out the basis of our claimed legal authority, and to explain what legal risks this action entails before taking action. Under the circumstances, proceeding on such a controversial decision today does not put an end to this issue. It only invites more delay, more confusion, and more possibility of legal challenge.

As we face the challenge of providing ubiquitous high-speed broadband to all our citizens, we need the certainty of a national strategy to get the job done. Right now this nation is hobbled because it has no such strategy, no plan for the infrastructure build-out our people need to be productive and competitive citizens of the world. The United States is ranked number twenty-one in the International Telecommunications Union's Digital Opportunity Index. It is difficult to take much comfort from being twenty-first in the Twenty-first century. The kind of broadband strategy I am talking about demands a level of consensus and national buy-in by the many diverse interests and entities that would be responsible for implementing it. While I have never equated franchise reform as anything remotely equivalent to a national broadband strategy, I do believe a properly-crafted and legally-certain franchising reform could facilitate some level of broadband build-out. That is what I attempted to work toward here. But if our decision is only going to increase concern, increase the questions and increase the risk, then I think we should pause, take a deep breath, answer the questions and reach out for more consensus. I don't say unanimity, of course, but at least a level of comfort that builds an environment wherein the next few years can see the job actually getting done rather than spent in contentious debate or court challenge because our reasoning was deemed inadequate.

So I thank my colleagues, and especially the Chairman, for the discussions we have had—discussions that were both in good faith and substantive—but in light of the concerns I have just discussed, I cannot support this afternoon's outcome. Unlike so many other proceedings coming before the Commission, I was nowhere near certain as I came to work this morning how the vote on this item would go. I actually thought that perhaps we would take the short time needed, answer the questions that had been posed, and then reassess where we were as to proceeding with an item. That was my preference. Instead it appears a majority will proceed to approve an item that, as drafted right now, is without important enhancements I have been advocating and without sufficient buy-in from the world beyond the FCC to assure its effectiveness. I must therefore respectfully dissent.

DISSENTING STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN

Re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 (MB Docket No. 05-311)

The policy goals of this *Order*, to promote competitive video offerings and broadband deployment, are laudable. But while I support these goals, today's item goes out on a limb in asserting federal authority to preempt local governments, and then saws off the limb with a highly dubious legal scheme. It substitutes our judgment as to what is reasonable – or unreasonable – for that of local officials – all in violation of the franchising framework established in the Communications Act.

Today's *Order* is certain to offend many in Congress, who worked long and hard on this important issue, only to have a Commission decision rushed through with little consultation. The result will be heavy oversight after-the-fact, and a likely rejection by the courts. It will solve nothing, create much confusion, and provide little certainty or progress on our shared goal of promoting real video competition and universal broadband deployment.

This outcome is disappointing because I believe we must do everything we can to encourage competitive video offerings. As I was driving to work

this morning, I saw a line of Verizon trucks installing FiOS in my neighborhood. I must admit, I am very excited about this new service, and plan to subscribe. FiOS is now available because our local county officials approved a franchise for Verizon. If they had not, I imagine many of my neighbors would have complained loudly. Maybe that is why Verizon has repeatedly told Wall Street investors, "[e]ven in those states where we don't have the whole state, places like Pennsylvania, we have become very successful now in getting franchising. So we don't see that as an issue going forward."[1] I am pleased with their efforts and their success, and want to encourage their continued investment.

As I said in the underlying *Notice of Proposed Rule Making*, "Congress clearly sought to promote competitive cable offerings and to facilitate the approval of competitive cable franchises in the Cable Act of 1992."[2] I agree the Commission should do what it can within the current legal framework to

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[1] *Final Transcript*, Thomson StreetEvents, VZ-Verizon at UBS 34th Annual Global Media Conference, Dec. 6, 2006, at page 7, available at, http://investor.verizon.com/news/20061206/20061206_transcript.pdf.

[2] Statement of Commissioner Jonathan S. Adelstein, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Notice of Proposed Rulemaking, FCC 05-180 (rel. Nov. 18, 2005) ("*Local Franchising NPRM*").

facilitate increased video competition because it benefits American consumers, promotes U.S. deployment of broadband networks and services, and enhances the free exchange of ideas in our democratic society.

Notwithstanding these worthy goals, I, unfortunately, cannot support this *Order* because the FCC is a regulatory agency, not a legislative body. In my years working on Capitol Hill, I learned enough to know that today's *Order* is legislation disguised as regulation. The courts will likely reverse such action because the Commission cannot act when it "does not really define specific statutory terms, but rather takes off from those terms and devises a comprehensive regulatory regimen.... This extensive quasi-legislative effort to implement the statute does not strike [me] as merely a construction of statutory phrases."[3]

Today's *Order* is disappointing because while there is bipartisan agreement that the current video

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[3] *Kelley v. E.P.A.*, 15 F.3d 1100, 1108 (DC. Cir. 1994). While the Commission contends that "[d]espite the parameters established by the Communications Act, ... operation of the franchising process has proven far more complex and time consuming than it *should be*," (Order, ¶ 3), the proper inquiry is whether the franchising process is operating *as Congress intended*. Today's *Order* ignores this important question. In so doing, the Commission disregards the parameters established in the Cable Act and imposes its view of how the franchising process *should be*.

franchising framework should be refined to better reflect marketplace realities, technological advancement, and consumer demands, the decision skips the fine-tuning and performs an extreme makeover. The majority accomplishes today what the elected representatives of the American people have tried to do through the legislative process. In doing so, the Commission not only disregards current law and exceeds its authority, but it also usurps congressional prerogatives and ignores the plain meaning of Title VI, the cannons of statutory construction, and the judicial remedy Congress already provided for unreasonable refusals. In crafting a broadly aggressive and legally tenuous solution, the majority attempts the legal equivalent of triple axels and quadruple toe loops that would only impress an Olympic judge who is willing to overlook slips, stumbles, and falls.

We might keep in mind former President Ronald Reagan's views on federalism and the role of local governments. In his first State of the Union Address, President Reagan exhorted Americans to give power back to local governments:

> Together, after 50 years of taking power away from the hands of the people in their states and local communities we have started returning power and resources to them. ... Some will also say our states and local communities are not up to the challenge of a new and

> creative partnership. Well, that might have been true 20 years ago. ... It's no longer true today. This Administration has faith in state and local governments and the constitutional balance envisioned by the Founding Fathers.[4]

More recently. President George W. Bush echoed this trust in local government, asserting that "government closest to the people is more responsive and accountable."[5] While the Commission has long viewed the cable franchising process as "a deliberately structured dualism,"[6] today's decision is a clear rebuke of this storied relationship with local government.

Congressional action in 1984, 1992, and 1996 re-affirmed further that it is Congress' intent that "the franchise process take[s] place at the local level where city officials have the best understanding of local communities' needs and can require cable operators to tailor the cable system to meet those

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[4] President Ronald Reagan, *State of the Union Address*, January 26, 1982, available at, http://www.reagan.utexas.edu/archives/speeches/1982/12682c.htm.

[5] George W. Bush, "What the Congress Can Do For America," WALL ST. J., January 3, 2007, at A13.

[6] *Cable Television Report and Order*, 36 F.C.C. 2d 143, 207 ¶177, *recon.*, 36 F.C.C. 2d 326 (1972).

needs."[7] This is clearly set forth in the purposes of Title 6, wherein Congress made clear that Title 6 would establish the proper local, state and federal roles.[8] Congress established a framework whereby state and local authorities, within certain federal limits, are primarily responsible for the administration of the franchising process. That process is inherently local and fact-specific. Indeed, a one-size-fits-all approach is antithetical to clear congressional intent that cable systems be "responsive to needs and interests of local community."[9]

To be sure, the franchising process is not perfect and, by definition, negotiations may result in some delay. But Congress, after much deliberation, created this process to achieve certain stated policy objectives, which are clearly set out in the Act. [10] Regardless of how commenters now feel about this carefully calibrated and negotiated balance, Congress delegated authority to state and local governments to make certain decisions and to

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[7] H.R. Rep. No. 934, 98th Congress, 2d Sess. at 24.

[8] 47 U.S.C. § 521 (3).

[9] 47 U.S.C. § 521(2).

[10] One of the principal purposes of Title VI is to "establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2).

determine the merit of granting cable franchises in their respective communities. It then set forth a judicial remedy if a party is aggrieved by a denial of franchising.[11] While Congress has the power to revisit this scheme, and has strongly considered doing so, until then this Commission must adhere to the law as written.

Yet today, the Commission is federalizing the franchising process, taking it upon itself to decide, in every local dispute, what is "unreasonable," without actually looking at specific, local examples to determine the real situation.[12] Instead of acknowledging the vast dispute in the record as to whether there are actually any unreasonable refusals being made today, the majority simply accepts in every case that the phone companies are right and the local governments are wrong, all without bothering to examine the facts behind these competing claims, or conduct any independent fact-finding. This is breathtaking in its disrespect of our local and state government partners and in its utter disregard for agency action based on a sound record.

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[11] 47 U.S.C. § 555.

[12] See Letter from David L. Smith, City Attorney, City of Tampa , to Kevin Martin, Chairman, FCC, dated January 5, 2007 (stating "[h]ow disappointing it was to learn that ... the FCC would embrace as truth an allegation in a rulemaking that has such far-reaching implications to so many, without doing any follow-up with the jurisdiction named to confirm it accuracy.").

Today's *Order* also displays a fundamental misunderstanding about the commitment of franchising authorities to bring competition to their citizens. By law, a franchise under Title 6 confers a right of access to people's property.[13] Unlike members of this Commission, many state and local officials are elected and directly accountable to their citizens. Our knee-jerk embrace of everything interested companies say while discounting local elected officials on a matter grounded in local property rights certainly does not inspire a great deal of confidence in the Commission's ability on the federal level to arbitrate every local dispute in the country and fairly decide who is unreasonable and who is not. Even if the Commission had such power, there is no mechanism outlined in this *Order* to establish how that process would work. Consequently, the end result will likely be litigation, confusion, abuse of the process, and a certain amount of chaos. It is sadly ironic that this agency, which has been recently in violation of one of its own 90 day statutory deadlines, is telling localities to do as I say, not as I do.[14]

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[13] *See* 47 U.S.C. § 541 (a)(2).

[14] See, e.g., In the Matter of Comcast Corporation's Request for Waiver of 47 C.F.R. § 76.120(a)(1), CSR-7017-Z, CS Docket No 97-80, DA-06-2543, CS Docket No 97-80, filed 4/19/06 (waiver proceeding placed on public notice 5/17/06 and decided 1/10/2007, well past the statutory "shot clock"); 47 U.S.C. § 549(c) ("the Commission shall grant any such waiver request within 90 days of any application filed under this subsection.").

Over the past two years, Congress held nearly two dozen hearings on franchising, and sought to amend the Cable Act in an effort to reform the current franchising process and "strike the right balance between national standards and local oversight."[15] Yet, the Commission has finalized in the dark of night what Congress was unable to resolve in two years of intensive public deliberations. In contrast to the Senate where I used to work, one might call the FCC the world's least deliberative body. And the final product shows it.

Congress would not have expended effort on a major piece of legislation had its members believed it was not necessary to grant the Commission explicit authority to do what the majority now contends the Commission can do under existing law. The House bill proposed a national cable franchising regime, while the Senate bill proposed an expedited competitive franchise process which would have required local authorities to issue franchises pursuant to a standard application drafted by the Commission. Today's *Order* turns federalism on its head by putting the Commission in the role of sole arbiter of what is a "reasonable" or "unreasonable" LFA practice and short-circuiting the franchising process if an arbitrary shot clock has expired.

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[15] H.R. REP. No. 109-470, at 3 (2006).

While Congress worked to change federal law to create a role for the Commission in the franchising process, there was and continues to be considerable state and local activity to reform the local franchising process. To date, nearly half of all states have adopted state-wide franchise reform or mandatory state franchise terms, or have engaged in a democratic process to enact meaningful franchise reform legislation.[16] Hundreds of other localities have approved new franchises, and many more are in the works.

When we launched this proceeding, the central question was "whether the local franchising process truly is a hindrance to the deployment of alternative video networks, as some new entrants assert[ed]."[17] Indeed, the *Local Franchising NPRM* explicitly solicited "empirical data" and "concrete examples" regarding problems in the franchising

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[16] While the *Order* purportedly refrains from explicitly preempting "statewide franchising decisions" and only addresses "decisions made by [instrumentalities of the state, such as] county – or municipal level franchising authorities," this dubious distinction has a questionable legal basis. Under Title 6, LFAs derive their power by virtue of state law, so such distinctions are not for the FCC to make. Moreover, the Commission's contention that it does not have sufficient information in the record to consider the effect of franchising by states (some of which have had laws in place for a decade), but has sufficient record evidence to preempt 33,000 LFAs, is facially preposterous.

[17] Adelstein Statement, *Local Franchising NPRM*.

process that FCC could resolve. In response, the record evidence provides scant, dated, isolated, and unverified examples that fall far short of demonstrating a systematic failure of state and local governments to negotiate in good faith and in a reasonable fashion.

According to the Telecommunications Industry Association, "some recent examples of overly-burdensome, and ... 'unreasonable,' extraneous obligations"[18] included: (1) Merton Group's two year negotiations with Hanover, New Hampshire, which concluded in December, 2004; (2) Knology's negotiations with Louisville, Kentucky in early 2000; (3) Knology's franchise negotiations with the greater Nashville, Tennessee area in March 2000; and (4) Grande Communication's negotiations with San Antonio and Corpus Christi, Texas in 2002. Additionally, Fiber-To-The-Home Council cites the efforts of Guadalupe Valley Telephone Cooperative to seek a franchise in the City of Bulverde, Texas in 2004. The *Order* itself relies on unconfirmed allegations by Verizon and AT&T about unreasonable demands and negotiations being drawn out over an extended period of time; and complaints by U.S. Telecom Association, Qwest, and Bell South about new entrants accepting franchise terms that they considered unreasonable in order to

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[18] Letter from Grant Seiffert, to Jonathan S. Adelstein, Commissioner, FCC, MB Docket No. 05-311 (dated December 11, 2006).

avoid further delay in obtaining the franchise, or, in one case, filing a "friendly lawsuit."

These examples, based on my review of the record evidence, represent the extent to which competitive video providers argue that LFAs are delaying in acting on franchise applications. However, considering the current franchising process has been in place nearly 15 years and there are over 30,000 LFAs, I find these sporadic examples, individually and collectively, wholly insufficient to justify the Commission's quasi-legislative attempt to federalize the local franchising process. These sparse allegations and anecdotal evidence do not rise to a level that warrants today's drastic, substantive measures. The Commission's blind acceptance of a few alleged instances as illustrative of a much broader problem is a poor and unfortunate reflection of the disregard for proper agency process. The Commission neither attempted to conduct any independent fact-finding or due diligence, nor verify the allegations made by parties who have a vested interest in the outcome of this proceeding.[19] Even more shocking, the

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[19] *Local Franchising NPRM*, ¶1 ("potential competitors seeking to enter the multichannel video programming distributor ("MVPD") marketplace have alleged that in many areas the current operation of the local franchising process serves as a barrier to entry. Accordingly, this *Notice* is designed to solicit comment on implementation of Section 621(a)(1)'s directive that LFAs not unreasonably refuse to award competitive franchises.")

Commission and the commenters fail to cite to a single actual, present day problem pending with any specific LFA.[20]

[20] During the Commission's Agenda Meeting in Keller, Texas, on February 10, 2006, one Verizon official identified Montgomery County, Maryland, as an obstinate LFA that was insisting upon unreasonable illegal demand and delaying negotiations. Since that meeting, Verizon has in fact obtained a franchise in Montgomery County. *See* Press Release, Montgomery Country, Md., County Negotiates Cable Franchise Agreement with Verizon; Agreement Resolves Litigation, Provides Increased Competition for Cable Service (Sept. 13, 2006) (available at http://www.montgomerycountymd.gov/apps/News/press/PR_details.asp?PrID=2582). In fact, this *Order* blatantly ignores public statements that significantly undermine representations some proponents of this decision have made to the Commission. For example, AT&T has publicly stated that Project Lightspeed will be available to 90% of its "high-value" customers, but to less than 5% of its "low value" neighborhoods, but today the Commission undermines a locality's ability to ensure all residents are served. Leslie Cauley, *Cable, Phone Companies Duke it out for Customers*, USA Today, May 22, 2005, available at: http://www.usatoday.com/money/media/2005-05-22-telco-tv-cover-usat_x.htm?csp=34 (last viewed 12/20/06). As Verizon's CEO of one major new entrant recently noted, "Any place it's come to a vote, we win." Dionne Searcey, *As Verizon Enters Cable Business, It Faces Local Static Telecom Giant Gets Demands As It Negotiates TV Deals*, Wall St. J., Oct. 28, 2005, at A1. Yet in today's *Order*, the Commission somehow determines that there is widespread bad faith only on the part of the LFAs, not the new entrants, in order to justify this sweeping federal preemption.

Notwithstanding the scant record evidence to justify agency preemption and the creation of a national, unified franchising process in contravention of federal law, the Commission conjures its authority to reinterpret and, in certain respects, rewrite section 621 and Title VI of the Communications Act, on just two words in section 621(a)(1)[21] – "unreasonably refuse." The Commission ignores the verb that follows: "to award." A plain reading section 621(a)(1) does not provide a wholesale "unreasonable" test for all LFA action. Rather, the statutory language focuses on the act of awarding a franchise. While I agree that the Commission has authority to interpret and implement the Communications Act, including Title VI,[22] the Commission does not have authority to

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[21] 47 U.S.C. §541(a)(1).

[22] Admittedly, however, read together, sections 621(a)(1) and 635(a), clearly vest the courts, not the FCC, with exclusive jurisdiction over the determination of what constitutes "unreasonably refuse." In light of the fact that these two provisions were amended simultaneously in 1992, this is the only rational interpretation. As NATOA pointed out in its Comments, "[i]t is ludicrous to suggest that Congress, having provided that only "final" decisions of the "denial" of a franchise application may be appealed, somehow intended, *sub silentio*, to have its own language gutted by allowing parties to bypass the last sentence of § 621(a)(1) entirely and go directly to the FCC." NATOA Comments at 28.

ignore the plain meaning, structure and legislative history of section 621, and judicial precedent. [23]

While the Commission purports to limit its action today to interpreting "unreasonably refuse," the *Order* stretches section 621 well beyond the meaning that the statute can bear and, consequentially, changes the franchising process in

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[23] The Senate Report of the 1992 Cable Act concluded that, "[b]ased on the evidence in the record taken as a whole; it is clear that there are benefits from competition between two cable systems. Thus, the Committee believes that local franchising authorities should be *encouraged [not required]* to award second franchises. Accordingly, [the 1992 Cable Act,] as reported, prohibits local franchising authorities from unreasonably refusing to grant second franchises." S. Rep. No. 102-92, at 47 (1991)(emphasis supplied). Thus, an LFA's decision to not grant a franchise need only not be unreasonable.

As one federal district court observed:

> The House version contained a specific list of "reasonable" grounds for denial. H. R. Conf. Rep. No. 102-862, at 168-69 (1992). The Senate version, on the other hand, listed "technically infeasible" and left other reasonable grounds undefined. By choosing not to adopt a federally mandated list of reasonable grounds for denial in favor of an open-ended definition, *Congress intended to leave states with the power to determine the bases for granting or denying franchises, with the only caveat being that a denial must be "reasonable."*

Knology, Inc. v. Insight Communications Co., L.P., 2001 WL 1750839 at * 2 (W.D. Ky. March 20, 2001) (citation omitted) (emphasis supplied).

fundamental ways. There are certain salient features of today's *Order* that raise serious legal and policy implications, requiring careful scrutiny. Most notably, the *Order*: (1) imposes a 90-day shot clock on LFAs to render a decision on the franchise application of a competitive applicant with existing rights-of-way; (2) deems a competitive entrant's franchise application granted after 90-days; (3) prohibits the denial of a competitive entrant's application based upon the entrant's refusal to comply with any build-out obligations; (4) prohibits the denial of a competitive entrant's application based upon the entrant's refusal to build and support PEG and I-net; and (5) authorizes a new entrant to refrain from obtaining a franchise when it is upgrading "mixed use" facilities that will be used for the delivery of video content.

The *Order* finds that franchising negotiations that extend beyond the time frames created today by the Commission amount to an unreasonable refusal to award a competitive franchise within the meaning of 621(a)(1). This finding ignores the plain reading of the first sentence of section 621(a)(1), which provides that a franchising authority "may not *unreasonably refuse to award* an additional competitive franchise."[24] On its face, Section 621(a)(1) does not impose a time limitation on an LFA's authority to consider, award, or deny a

[24] 47 U.S.C. §541(a)(1) (emphasis added).

competitive franchise. The second and final sentence of section 621(a)(1) provides judicial relief, with no Commission involvement contemplated, when the competitive franchise has been "denied by *a final decision* of the franchising authority."[25] There is no ambiguity here: Congress simply did not impose a time limit on franchise negotiations, as it did on other parts of Title VI (see discussion *infra*). Hence, whether you read the first sentence alone or in context of the entire statutory provision or title, its plain and unambiguous meaning is contrary to the Commission's interpretation. Section 621(a)(1) provides an expressed limitation on the *nature*, not the timing, of the refusal to award a competitive franchise.[26]

Even if I were able to move beyond this *Order*'s facially defective reading of 621(a)(1), the Commission's selection of 90 days as the only

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[25] *Id.* (emphasis added).

[26] Congressional intent to qualify the nature of an LFA's refusal, not the timing of the refusal, is clear when you consider another provision of Section 621(a). Section 621(a)(4)(A) provides that "franchising authority shall allow the applicant's cable system *a reasonable period of time* to become capable of providing cable service to all households in the franchise area." In that case, Congress explicitly qualified timing, not the scope of buildout. As demonstrated in the Order, the Commission's attempt to super-inflate the meaning of "unreasonably refuse" in 621(a)(1), and diminish the significance of "unreasonable period of time" in section 621(a)(4)(A) is transparently inconsistent and blatantly self-serving.

reasonable time frame for an LFA to consider the franchise application of a competitive provider that already has rights-of-way access before it is "deemed granted" is demonstrably inconsistent with the overall framework of Title VI, unsupported by the record evidence, and quite arbitrary.

The franchising framework established in Title VI does not support the Commission's decision to select 90 days as the deadline for a default grant – another Commission creation – to become effective.[27] Throughout Part III (Franchising and Regulation) of Title VI, when Congress specifically decided to impose a deadline for LFAs to consider sales of cable systems, modification of franchise obligations, and renewals of existing franchises, in all three instances, Congress chose 120 days.[28] In other

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[27] The *Order* imposes a time limit of 90 days on LFAs to decide franchise applications from entities that already have access to public rights-of-way and a time limit of six months for applicants that are not already authorized to occupy the rights-of-way. Such a distinction does not exist in Title 6, notwithstanding the fact that Congress specifically contemplated phone companies – entities that already have access to public rights-of-way – obtaining franchises to provide video service.

[28] 47 U.S.C. § 537 (providing LFAs 120 days to act upon request for approval of sale or transfer on cable systems); 47 U.S.C. § 545 (providing LFAs 120 days to modify franchise obligations); and 47 U.S.C. § 546 (providing LFAs a "4-month period" to "renew the franchise or, issue a preliminary assessment that the franchise should not be renewed").

sections of the Act, the prevalent time frame Congress imposed on LFAs and the Commission is 180 days.[29] Today, the Commission, without authority, cannot take the place of Congress and impose a tighter time frame than Congress ever contemplated to impose on LFAs in the franchising process. This is well beyond Commission "line-drawing" authority, which requires the Commission to operate within the established framework of the authorizing legislation.

While a 90-day deadline arguably could be considered "reasonable," that is not the statutory standard the Commission is purporting to use as the basis of its authority. We can only define "*unreasonable*" refusal, [30] which could be "foot-dragging" or "stonewalling" that amounts to a *defacto* denial of a franchise application. This is not the same as establishing an arbitrary, inflexible 90-day time frame, which overlooks the fact that 120 or 180 days may be reasonable under certain circumstances. While the Commission has line-drawing authority in some cases, the position taken in the *Order* is untenable on its face, given that

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[29] *See, e.g.*, 47 U.S.C. § 543 (authorizing the Commission to "ensure that the rates for the basic service tier are reasonable" and requiring the Commission to develop regulations in 180 days).

[30] 47 U.S.C. § 541(a)(1). Today's *Order* specifically adopts rules that prohibit franchising authorities from "*unreasonably* refusing" to award competitive franchises. *Order* at ¶ 1.

Congress set a 120-day deadline for franchise transfers, which tend to be simpler than awarding new franchises, unless one is willing to assert that Congress itself was unreasonable. The aggressive schedule set here, while understandable and even desirable from a policy perspective, is evidence of the legislative nature of the *Order*.

To make matters worse, the Commission-created 90-day shot clock seems to function more like a waiting period, during which time the new entrant has little incentive to engage in meaningful negotiations. An objective review of the evidence shows that there is sufficient blame on both sides of the negotiation table. Sometimes, there are good reasons for delay; and at other times, one side might stall to gain leverage.[31] While the majority is certainly aware of these tactics, they fail to even mention the need for LFAs and new entrants to

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[31] As the July 11, 2006, filing of the Greater Metro Telecommunications Consortium, the Rainer Communications Commission and the City of Tacoma, Washington explained: "[I]t is an oversimplification to believe that competitive entry into video programming can be facilitated by requiring a local government to act on a franchise application within a specific period of time. What the Commission may consider a delay is often a reasonable time for consideration, and indeed, the internal bureaucracies within many large companies often times dwarf the internal processes within local government, so that any rule the Commission might deem appropriate to apply regarding time to respond, must also be imposed upon the other party to negotiations."

abide by, or so much as to have, reciprocal good faith negotiation obligations. The majority also has ignored the apparent need to develop a complaint or grievance mechanism for the parties to ensure compliance. Perhaps Congress might consider imposing on the Commission a binding deadline to resolve complaints, which would inject an incentive for both sides to negotiate, meaningfully and in good faith.[32]

Without anything other than the asserted authority to interpret "unreasonably refuse," the Commission creates a regulatory reprimand for an LFA's failure to render a final decision within the Commission-created time limits. The consequences of the failure to reach agreement within 90 days is that the LFA will be deemed to have granted the competitive entrant an interim franchise based on the terms proposed in the entrant's franchise application. In practicality, this will confer rights-of-

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[32] The Commission purposefully stops short of creating reciprocal good faith obligations because that would authorize the parties to file a complaint with the Commission when negotiations fall apart. Such a complaint process would effectively serve as an enforcement mechanism, which would only increase this *Order*'s litigation exposure as quasi-legislative document. Nevertheless, today's *Order* cannot be reasonably viewed as mere guidance to LFAs or a clarification of the term "unreasonably refuse" in section 621(a)(1). There is a real, punitive consequence if the LFA does not follow the Commission's dictates – a "deemed granted" franchise, which incurably alters the dynamics of franchise negotiations.

way access over local property. In selecting this remedy, the Commission purportedly "seeks to provide a meaningful incentive for local franchising authority to abide by the deadlines contained in the *Order*."[33] While the policy goal is understandable and arguably consistent with congressional intent to encourage the award of competitive cable franchises, we do not have legal authority to establish punitive, one-sided consequences, in order to create an "incentive." Moreover, the Commission ignores that by establishing a default grant of franchise applications effectively confers local property rights unilaterally and without regard for inherent local police powers and public health, safety and welfare.

The Commission cites no credible authority that empowers it to deem a new entrant's franchise application granted by the LFA and thus confer local property rights.[34] When construing a statute, principles of construction caution against any interpretation that may contravene existing law or U.S. Constitution. In this case, I am wary of a

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[33] *Order* at ¶ 76.

[34] The Commission's reliance on ancillary authority it exercised in the early 1970s, well before congressional enactments in 1984, 1992 and 1996, is unavailing. In fact, such reliance reveals the Commission's need to make too large a reach to justify it actions. *See* Letter from James L. Casserly, Counsel for Comcast Corporation, to Marlene Dortch, Federal Communications Commission , MB Docket No. 05-311 (filed December 13, 2006).

federal agency, which purports not to preempt any state-based franchising law, but yet is prepared to step into the shoes of an LFA – an instrumentality of the state – to grant a franchise application with all the attendant rights-of-way privileges.[35]

The Commission rejected an approach that would have deemed an application "denied" once the shot clock expired without LFA action. This approach, I maintain, would have expedited the judicial review that was Congress' chosen remedy, and is infinitely more consistent with the letter and spirit of the Communications Act, Title VI, and specifically sections 621(a)(1) and 635. Nowhere in the Act is the Commission granted the authority to force localities to grant franchises. Simply put, the Commission's "deemed granted" approach in the *Order* is not a justifiable choice to fill the perceived gap left open by Congress when it did not provide a specific remedy against LFA action that is short of an outright denial of a franchise application. While it is generally proper for the Commission to exercise its "predictive judgment," that is only when the Commission has the requisite authority to act within

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[35] *See generally, Charter Communications v. County of Santa Cruz*, 304 F.3d 927 (9th Cir. 2002) (holding that deference is accorded to legislative action of local government), especially in light of fact that the Commission does not have clear congressionally delegated authority in this case; and local regulations, in this case, are likely explicitly sanctioned by the Cable Act and consistent with the express provisions of the Act, *see* 47 U.S.C. § 556(a).

a certain area and it stays within its authority. Neither exists in this case.

In terms of build-out, the Commission seems to make a deliberate effort to overlook the plain meaning of the statute and to substitute its policy judgment for that of Congress. The Commission concludes that it is unlawful for LFAs to refuse to grant a competitive franchise on the basis of an applicants' refusal to agree to any build-out obligations. The Commission's analysis in this regard is anemic and facially inadequate.

Section 621(a)(4)(A) provides that "[i]n awarding a franchise *the franchising authority* shall allow the applicant's cable system a *reasonable period of time* to become capable of providing cable service to all households in the franchise area." Absent express statutory authority, the Commission cannot declare it unreasonable for LFAs to require build-out to all households in the franchise area over a reasonable period of time. The Commission's argument in this regard is particularly spurious in light of the stated objective of this *Order* to promote broadband deployment and our common goal of promoting affordable broadband to all Americans. In the end, this is less about fiber to the home and more about fiber to the McMansion.

The Commission is correct on one point, that section 621(a)(4)(A) is actually a limitation on LFA authority. However, consistent with plain reading of

the provision and its legislative history, Section 621(a)(4)(A) surely is not a grant of authority to the Commission and does not impose a limitation on the *scope* of a competitive provider's build-out obligations. Indeed, section 621(a)(4)(A) explicitly limits the "period of time" to build-out, but an LFA is unrestrained to impose full, partial, or no build-out obligations on all cable service providers. As long as an LFA gives a competitive provider "a reasonable period of time to become capable of providing cable service to all households in the franchise area," section 621(a)(4)(A) essentially shields build-out requirement from constituting an "unreasonable refusal" to grant a competitive franchise. While this policy could be changed by Congress to facilitate competitive entry, that is not the current state of the law. An LFA cannot be prohibited from requiring build-out to all households in the franchise area if an LFA allows "a reasonable period of time" to do so. The Commission has not been ordained with a legislative "blue pencil" to rewrite law. Congress specifically directed LFAs – not the FCC – to allow a reasonable period of time for build-out. As much as the Commission would like it be its role, Congress gave the role to LFAs, and it is Congress' purview to modify that explicit delegation of authority.

Assuredly, Section 621(a)(4)(A) does not impose "universal" or "uniform" build-out requirements on franchise applicants. This may be a reflection of congressional intent to focus on the

needs of the locality.[36] However, it does not prohibit LFAs from requiring build-out obligations as a condition of franchise approval, so long as the competitive applicant is given a reasonable period of time.

The rapid deployment of broadband has been a goal of mine since I joined this Commission. Wireline competition in the video market, particularly, is critical as a means to constrain prices, which in itself is a worthy goal after year upon year of price hikes. It is also critical to the future of our democracy that Americans have access to as many forms of video content as possible so they can make up their own minds about the issues of the day and not remain subject to a limited number of gatekeepers who decide what deserves airing based on their own financial or ideological interests. But, in order for the Commission to promote these goals effectively, we must operate within our legal authority.

Perhaps the majority has failed to consider the real life consequences of today's *Order*. For instance, in New York City, competitive entrants could file the Commission-mandated informational

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[36] *See* 47 U.S.C. § 521 (2)(stating that the one of the central purposes of Title 6 is to "assure that cable systems are responsive to the needs and interests of the local community.") *See also* 47 U.S.C. § 521(3)(stating that another central purpose of Title 6 is to establish clear federal, state and local roles).

filing that proposes to serve only Broadway, Madison, or Park Avenue. Under today's *Order*, the New York City franchising authority would be forbidden from denying the competitive franchise based solely on the fact that the new entrant refuses to certain build-out requirements. The LFA is placed in the difficult position of either denying outright the franchise and absorb the costs and fees for the ensuing litigation, or agree to a franchise that is not responsive to needs and interests of local community.

How can the majority declare build-out to be an impediment to entry when one of the major incumbent phone companies, AT&T, claims that it does not need a franchise to operate its video service, and the other, Verizon, has agreed to different, but favorable, build-out obligations with various states and localities? Under the federalist scheme of the Act, different jurisdictions can choose models that best suit their specific needs. For example, in New Jersey, the state-wide franchise reform law correlates build-out principally to population density, while build-out obligations in Virginia principally track the entrant's existing wireline facilities. And in New York City, Verizon and the LFA were actively negotiating universal build-out over a period of a few years.

The broad pen with which the majority writes today's *Order* does not stop with build-out. The *Order* also uses the Commission's alleged authority

under Section 621(a)(1) to determine that any LFA refusal to award a competitive franchise because of a new entrant's refusal to support PEG or I-Net is *per se* unreasonable. Although the *Order* purports to provide clarification with respect to which franchise fees are permissible under the Act, it muddles the regime and leaves communities and new entrants with conflicting views about funding PEG and I-Net. Indeed, Congress provided explicit direction on what constitutes or does not constitute a franchise fee, with a remedy to the courts for aggrieved parties.

Today's Order should make clear that, while any requests made by an LFA unrelated to the provision of cable service *and* unrelated to PEG or I-NET are subject to the statutory five percent franchise fee cap, these are not the type of costs excluded from the term "franchise fee" by section 622(g)(2)(C). That provision excludes from the term "franchise fee" any "capital costs that are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities." The legislative history of the 1984 Cable Act clearly indicates that "any franchise requirement for the provision of services, facilities or equipment is not included as a 'fee.'" [37]

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[37] The legislative history of 1984 Cable Act provides "in general, [section 622(g)(2)(C)] defines as a franchise fee only monetary payments made by the cable operator, and does not include as a 'fee' any franchise requirement for the provision of services, facilities or equipment. As regards PEG access in new franchises, payments for capital costs required by the franchise (continued)

PEG facilities and access provide an important resource to thousands of communities across this country. Equally important, redundancy or even duplicative I-Net provides invaluable homeland security and public health, safety and welfare functions in towns, cities, and municipalities across America. It is my hope that today's decision does not undermine these and other important community media resource needs.

While my objections to today's *Order* are numerous and substantial, that should not overlook the real need I believe there is for franchise reform. Indeed, there is bipartisan support for reform in Congress, and most LFAs throughout this country are committed to bring video competition to their jurisdictions. My fundamental concern with this *Order* is that it is based on such paper-thin jurisdiction, but it is truly broad in scope. It ignores the plain reading of the section 621, usurps congressional prerogative and pre-empts LFAs in certain important respects that directly contradict the Act.

The sum total here is an arrogant case of federal power riding roughshod over local

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(Continued from previous page)

to be made by the franchise to be made by the cable operator are not defined as fees under this provision." H.R. REP. No. 98-934, at 65 reprinted in 1984 U.S.C.C.A.N. 4702.

governments. It turns federalism on its head. While I can support certain efforts to streamline the process and preclude local authorities from engaging in unreasonable practices, this item blatantly and unnecessarily tempts the federal courts to overturn this clearly excessive exercise of the limited role afforded to us by the law. The likely outcome of being reversed in Federal Court could have pernicious and unintended consequences in limiting our flexibility to exercise our discretion in future worthy endeavors.

Accordingly, I dissent.

STATEMENT OF COMMISSIONER DEBORAH TAYLOR TATE

Re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 (MB Docket No. 05-311)

Today's item, like most we address as an expert agency, is full of sophisticated technical, legal, and policy arguments. At a high level, however, I view this as a continuation down a path of deregulatory policies designed to encourage new market entry, innovation, and investment. Indeed, "encourag[ing] more robust competition in the video marketplace" by limiting franchising requirements has long been a stated goal of the Commission as well as a driving force behind statutory terms we interpret today.

Section 621(a)(1) of the Communications Act of 1934, as amended (the "Act"), states that franchising authorities ("LFAs") may not "unreasonably refuse to award" a competitive franchise to provide cable services. I agree with our conclusion that we have the jurisdictional authority to interpret this section of the Act and adopt rules to implement it. In amending Section 621(a)(1) to include the phrase "unreasonably refuse to award," Congress explicitly limited the authority of LFAs. However, if an LFA does not make a final decision

for months on end, or perhaps even years as the record indicates, new entrants are given no recourse. Also, unreasonable demands, similar to long delays, serve as a further barrier to competitive entry. It is nonsensical to contend that, despite the limitation on LFA authority in the Act, LFAs remain the sole arbiters of whether their actions in the franchise approval process are reasonable. Since the section's judicial review provision applies only to final decisions by LFAs, absent Commission action to identify "unreasonable" terms and conditions, franchise applicants would have no avenue for redress. I conclude that our broad and well-recognized authority as the federal agency responsible for administering the Act, including Title VI, permits us to identify such terms and conditions, and I support our exercise of that authority.

As with most orders, we explored numerous ways to achieve our goals. I ultimately support today's item, because I believe that, by streamlining timeframes for action and providing practical guidelines for both LFAs and new entrants, the item encourages the development of competition in the video marketplace and speeds the deployment of broadband across the country in a platform-neutral manner. These beneficial policy results should not be underestimated. Our annual reports to Congress on cable prices, including the report we adopt today, consistently show that prices are lower where wireline competition is present. And, of course, broadband deployment enhances our ability to

educate our children for the jobs of tomorrow and ensures that the United States remains competitive in this global communications age.

Additionally, I am pleased that we recognize – and do not preempt – the actions of those states that have reformed their franchise rules. Their efforts to streamline the process for competitive entry are laudable.

Finally, it is critical that as we advance pro-competitive policies, we ensure that our policies do not unreasonably create asymmetry in the marketplace. Accordingly, I am encouraged that we resolve to address open issues regarding existing franchise agreements on an expedited basis. I encourage all interested parties to use your energies toward assisting us as we seek a way to apply more broadly our conclusions across all companies.

STATEMENT OF COMMISSIONER ROBERT M. MCDOWELL

Re: *In the matter of: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 (MB Docket No. 05-311)*

I have long advocated the Commission doing all that it can to open new opportunities for entrepreneurs to have the freedom to construct new delivery platforms for innovative new services. More delivery platforms mean more competition. More competition means consumers can choose among more innovative offerings. As consumers become more empowered, prices fall and, as a result, new technologies become more available to help improve the lives of all Americans. In short, creating a de-regulatory environment where competition is given the chance to flourish kicks off a virtuous cycle of hope, investment, growth and opportunity.

Today, the Commission is taking a step forward in what I hope will be a noble quest to spur more competition *across* many delivery platforms and, where appropriate, *within* delivery platforms. While we already have some competition in the video market, American consumers are demanding even more competition. And that's the goal of our action

today: more competition through de-regulation. Perhaps President Ronald Reagan foresaw an issue like this one when he said, "We have a healthy skepticism of government, checking its excesses at the same time we're willing to harness its energy when it helps improve the lives of our citizens." That is precisely what we are doing today: checking any government excesses at the local level to unleash free markets which will help improve the lives of all Americans.

This order strikes a careful balance between establishing a de-regulatory national framework to clear unnecessary regulatory underbrush, while also preserving local control over local issues. It guards against localities making unreasonable demands of new entrants, while still allowing those same localities to be able to protect important local interests through meaningful negotiations with aspiring video service providers. Local franchising authorities are still free to deny deficient applications on their own schedule, but we are imposing a "shot clock" to guard against unreasonable delay. After the shot clock runs out, if the locality has not granted or denied the application, an interim or temporary authority will be granted to give the parties more time to reach a consensus. If the LFA feels as though it cannot grant a franchise during this period, they are free to deny the application. And unhappy applicants still have the liberty to go to court, as codified under federal law.

Additionally, should communications companies decide to upgrade their existing non-cable services networks, localities may not require them to obtain a franchise. However, this order does not address whether video service providers can avoid local or federal jurisdiction over those video services because those services are carried over differing protocols, such as Internet protocol. That question is explicitly left for another docket.

In the same spirit of deference to localities, we are not pre-empting recently enacted state laws that make it easier for new video service providers to enter the market. Those important frameworks will remain intact. Similarly, on the important issue of build-out requirements, we preserve local flexibility to implement important public policy objectives, but we don't allow localities to require new entrants to serve everybody before they serve anybody.

Many commenting parties, Members of Congress, and two of my distinguished colleagues, have legitimately raised questions regarding the Commission's authority to implement many of these initiatives. I have raised similar questions. However, as the draft of this item has evolved and, I think, improved, my concerns have been assuaged, for the most part. The Commission has ample general and specific authority to issue these rules under several sections including, but not limited to, sections: 151, 201, 706, 621, 622, and many others.

Furthermore, a careful reading of applicable case law shows that the courts have consistently given the Commission broad discretion in this arena. While I understand the concerns of others, after additional study, I feel as though we are now on safe legal ground. But I know that reasonable minds will differ on this point and that appellate lawyers are already on their way to the court house. That is the American way, I suppose.

This order is not perfect. If it were, it would say that all of the de-regulatory benefits we are providing to new entrants we are also providing to all video providers, be they incumbent cable providers, over-builders or others. I want to ensure that no governmental entities, including those of us at the FCC, have any thumb on the scale to give a regulatory advantage to any competitor. But the record in this proceeding does not allow us to create a regulatory parity framework just yet. That's why I am pleased that today's order and further notice contain the tentative conclusion that the relief we are granting to new entrants will apply to all video service providers once they renew their franchises.

Also, I have consistently maintained during my time here that if shot clocks are good for others then they are good for the FCC itself. Accordingly, I am pleased that the Chairman has agreed to release an order as a result of the further notice no later than six months from the release date of this order, and regardless of the appellate posture of this

matter. Resolving these important questions soon will give much-needed regulatory certainty to all market players, spark investment, speed competition on its way, and make America a stronger player in the global economy. By the same token, it is no secret that I would also like to see the Commission act more quickly on petitions filed by any individual or industry group, especially if those petitions may help spur competition in any market, be it video, voice, data, wireless, or countless others. We should never let government inaction create market distortions.

I thank my entire staff, especially Cristina Pauzé, for their long hours, dedication and insight regarding this order. I also thank the tireless Media Bureau and the General Counsel's office for their tremendous efforts on this important matter. Lastly, I would like to thank Chairman Martin for his strong leadership on this issue.

APPENDIX D

Nos. 07-3391/3569/3570/3571/ 3572/3573/3574/3673/3674/ 3675/3676/3677/3824

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Alliance for Community Media, et al., Petitioners,

State of Hawaii, et al., Intervenors,

v.

Federal Communications Commission, et al., Respondents,

Ad Hoc Telecom Manufacturer Coalition, et al., Intervenors.

ORDER

BEFORE: SUHRHEINRICH, COLE, and GIBBONS, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion

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* Judge Moore recused herself from participation in this ruling.

for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

October 29, 2008

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitutional Provisions

Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Statutory Provisions

Section 1 of the Communications Act, 47 U.S.C. § 151

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

Section 2 of the Communications Act, 47 U.S.C. § 152

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A.

(b) Exceptions to Federal Communications Commission jurisdiction

Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1)

charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

Section 201 of the Communications Act, 47 U.S.C. § 201

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by

wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this

chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

Section 224 of the Communications Act, 47 U.S.C. § 224

§ 224. Pole attachments

(a) Definitions

As used in this section:

(1) The term "utility" means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(5) For purposes of this section, the term "telecommunications carrier" (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems

appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that--

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments--

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter--

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

(d) Determination of just and reasonable rates; "usable space" defined

(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by

the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

(e) Regulations governing charges; apportionment of costs of providing space

(1) The Commission shall, no later than 2 years after February 8, 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just,

reasonable, and nondiscriminatory rates for pole attachments.

(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

(4) The regulations required under paragraph (1) shall become effective 5 years after February 8, 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.

(f) Nondiscriminatory access

(1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

(g) Imputation to costs of pole attachment rate

A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(h) Modification or alteration of pole, duct, conduit, or right-of-way

Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of

the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

(i) Costs of rearranging or replacing attachment

An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).

Section 303 of the Communications Act, 47 U.S.C. § 303

§ 303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall--

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power

which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however*, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(l)(1) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to persons who are found to be qualified by the Commission and who otherwise are legally eligible for employment in the United States, except that such requirement relating to eligibility for employment in the United States shall not apply in the case of licenses issued by the Commission to (A) persons holding United States pilot certificates; or (B) persons holding foreign aircraft pilot certificates which are valid in the United States, if the foreign government involved has entered into a reciprocal agreement under which such foreign government does not impose any similar requirement relating to

eligibility for employment upon citizens of the United States;

(2) Notwithstanding paragraph (1) of this subsection, an individual to whom a radio station is licensed under the provisions of this chapter may be issued an operator's license to operate that station.

(3) In addition to amateur operator licenses which the Commission may issue to aliens pursuant to paragraph (2) of this subsection, and notwithstanding section 301 of this title and paragraph (1) of this subsection, the Commission may issue authorizations, under such conditions and terms as it may prescribe, to permit an alien licensed by his government as an amateur radio operator to operate his amateur radio station licensed by his government in the United States, its possessions, and the Commonwealth of Puerto Rico provided there is in effect a multilateral or bilateral agreement, to which the United States and the alien's government are parties, for such operation on a reciprocal basis by United States amateur radio operators. Other provisions of this chapter and of subchapter II of chapter 5, and chapter 7, of Title 5 shall not be applicable to any request or application for or modification, suspension, or cancellation of any such authorization.

(m)(1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee--

(A) has violated, or caused, aided, or abetted the violation of, any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted--

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him, and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act, or which the Commission by rule has authorized to operate without a license under section 307(e)(1) of this title, or

which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this chapter;

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation. The permittee or licensee, and the tower owner in any case in which the owner is not the permittee or licensee, shall maintain the painting and/or illumination of the tower as prescribed by the Commission pursuant to this section. In the event that the tower ceases to be licensed by the Commission for

the transmission of radio energy, the owner of the tower shall maintain the prescribed painting and/or illumination of such tower until it is dismantled, and the Commission may require the owner to dismantle and remove the tower when the Administrator of the Federal Aviation Agency determines that there is a reasonable possibility that it may constitute a menace to air navigation.

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

(t) Notwithstanding the provisions of section 301(e) of this title, have authority, in any case in which an aircraft registered in the United States is operated (pursuant to a lease, charter, or

similar arrangement) by an aircraft operator who is subject to regulation by the government of a foreign nation, to enter into an agreement with such government under which the Commission shall recognize and accept any radio station licenses and radio operator licenses issued by such government with respect to such aircraft.

(u) Require that apparatus designed to receive television pictures broadcast simultaneously with sound be equipped with built-in decoder circuitry designed to display closed-captioned television transmissions when such apparatus is manufactured in the United States or imported for use in the United States, and its television picture screen is 13 inches or greater in size.

(v) Have exclusive jurisdiction to regulate the provision of direct-to-home satellite services. As used in this subsection, the term "direct-to-home satellite services" means the distribution or broadcasting of programming or services by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscriber's premises or in the uplink process to the satellite.

(w) Omitted.

(x) Require, in the case of an apparatus designed to receive television signals that are shipped in interstate commerce or manufactured in the United States and that have a picture screen 13

inches or greater in size (measured diagonally), that such apparatus be equipped with a feature designed to enable viewers to block display of all programs with a common rating, except as otherwise permitted by regulations pursuant to section 330(c)(4) of this title.

(y) Have authority to allocate electromagnetic spectrum so as to provide flexibility of use, if--

(1) such use is consistent with international agreements to which the United States is a party; and

(2) the Commission finds, after notice and an opportunity for public comment, that--

(A) such an allocation would be in the public interest;

(B) such use would not deter investment in communications services and systems, or technology development; and

(C) such use would not result in harmful interference among users.

Section 602 of the Communications Act, 47 U.S.C. § 522

§ 522. Definitions

For purposes of this subchapter--

(1) the term "activated channels" means those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use;

(2) the term "affiliate", when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person;

(3) the term "basic cable service" means any service tier which includes the retransmission of local television broadcast signals;

(4) the term "cable channel" or "channel" means a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation);

(5) the term "cable operator" means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the

management and operation of such a cable system;

(6) the term "cable service" means--

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

(B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service;

(7) the term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an

open video system that complies with section 573 of this title; or (E) any facilities of any electric utility used solely for operating its electric utility system;

(8) the term "Federal agency" means any agency of the United States, including the Commission;

(9) the term "franchise" means an initial authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to section 546 of this title), issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system;

(10) the term "franchising authority" means any governmental entity empowered by Federal, State, or local law to grant a franchise;

(11) the term "grade B contour" means the field strength of a television broadcast station computed in accordance with regulations promulgated by the Commission;

(12) the term "interactive on-demand services" means a service providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming prescheduled by the programming provider;

(13) the term "multichannel video programming distributor" means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming;

(14) the term "other programming service" means information that a cable operator makes available to all subscribers generally;

(15) the term "person" means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity;

(16) the term "public, educational, or governmental access facilities" means--

(A) channel capacity designated for public, educational, or governmental use; and

(B) facilities and equipment for the use of such channel capacity;

(17) the term "service tier" means a category of cable service or other services provided by a cable operator and for which a separate rate is charged by the cable operator;

(18) the term "State" means any State, or political subdivision, or agency thereof;

(19) the term "usable activated channels" means activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations as determined by the Commission; and

(20) the term "video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

Section 621 of the Communications Act, 47 U.S.C. § 541

§ 541. General franchise requirements

(a) Authority to award franchises; public rights-of-way and easements; equal access to service; time for provision of service; assurances

(1) A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final

decision pursuant to the provisions of section 555 of this title for failure to comply with this subsection.

(2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure--

(A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

(C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

(3) In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income

of the residents of the local area in which such group resides.

(4) In awarding a franchise, the franchising authority--

(A) shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;

(B) may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; and

(C) may require adequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service.

(b) No cable service without franchise; exception under prior law

(1) Except to the extent provided in paragraph (2) and subsection (f) of this section, a cable operator may not provide cable service without a franchise.

(2) Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires.

(3)(A) If a cable operator or affiliate thereof is engaged in the provision of telecommunications services--

(i) such cable operator or affiliate shall not be required to obtain a franchise under this subchapter for the provision of telecommunications services; and

(ii) the provisions of this subchapter shall not apply to such cable operator or affiliate for the provision of telecommunications services.

(B) A franchising authority may not impose any requirement under this subchapter that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.

(C) A franchising authority may not order a cable operator or affiliate thereof--

(i) to discontinue the provision of a telecommunications service, or

(ii) to discontinue the operation of a cable system, to the extent such cable system is used for the provision of a telecommunications service, by reason of the failure of such cable operator or affiliate thereof to obtain a franchise or franchise renewal under this subchapter with respect to the provision of such telecommunications service.

(D) Except as otherwise permitted by sections 531 and 532 of this title, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.

(c) Status of cable system as common carrier or utility

Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

(d) Informational tariffs; regulation by States; "State" defined

(1) A State or the Commission may require the filing of informational tariffs for any intrastate communications service provided by a cable system, other than cable service, that would be subject to regulation by the Commission or any State if offered by a common carrier subject, in whole or in part, to subchapter II of this chapter. Such informational tariffs shall specify the rates, terms, and conditions for the provision of such service, including whether it is made available to all subscribers generally, and shall take effect on the date specified therein.

(2) Nothing in this subchapter shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis.

(3) For purposes of this subsection, the term "State" has the meaning given it in section 153 of this title.

(e) State regulation of facilities serving subscribers in multiple dwelling units

Nothing in this subchapter shall be construed to affect the authority of any State to license or otherwise regulate any facility or combination of facilities which serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management and which does not use any public right-of-way.

(f) Local or municipal authority as multichannel video programming distributor

No provision of this chapter shall be construed to--

(1) prohibit a local or municipal authority that is also, or is affiliated with, a franchising authority from operating as a multichannel video programming distributor in the franchise area, notwithstanding the granting of one or more franchises by such franchising authority; or

(2) require such local or municipal authority to secure a franchise to operate as a multichannel video programming distributor.

Section 622 of the Communications Act, 47 U.S.C. § 542

§ 542. Franchise fees

(a) Payment under terms of franchise

Subject to the limitation of subsection (b) of this section, any cable operator may be required under the terms of any franchise to pay a franchise fee.

(b) Amount of fees per annum

For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services. For purposes of this section, the 12-month period shall be the 12-month period applicable under the franchise for accounting purposes. Nothing in this subsection shall prohibit a franchising authority and a cable operator from agreeing that franchise fees which lawfully could be collected for any such 12-month period shall be paid on a prepaid or deferred basis; except that the sum of the fees paid during the term of the franchise may not exceed the amount, including the

time value of money, which would have lawfully been collected if such fees had been paid per annum.

(c) Itemization of subscriber bills

Each cable operator may identify, consistent with the regulations prescribed by the Commission pursuant to section 543 of this title, as a separate line item on each regular bill of each subscriber, each of the following:

(1) The amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid.

(2) The amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels.

(3) The amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber.

(d) Court actions; reflection of costs in rate structures

In any court action under subsection (c) of this section, the franchising authority shall

demonstrate that the rate structure reflects all costs of the franchise fees.

(e) Decreases passed through to subscribers

Any cable operator shall pass through to subscribers the amount of any decrease in a franchise fee.

(f) Itemization of franchise fee in bill

A cable operator may designate that portion of a subscriber's bill attributable to the franchise fee as a separate item on the bill.

(g) "Franchise fee" defined

For the purposes of this section--

(1) the term "franchise fee" includes any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such;

(2) the term "franchise fee" does not include--

(A) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly

discriminatory against cable operators or cable subscribers);

(B) in the case of any franchise in effect on October 30, 1984, payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of, public, educational, or governmental access facilities;

(C) in the case of any franchise granted after October 30, 1984, capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities;

(D) requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or

(E) any fee imposed under Title 17.

(h) Uncompensated services; taxes, fees and other assessments; limitation on fees

(1) Nothing in this chapter shall be construed to limit any authority of a franchising authority to impose a tax, fee, or other assessment of any kind on any person (other than a cable operator) with respect to cable service or other communications service provided by such person over a cable system

for which charges are assessed to subscribers but not received by the cable operator.

(2) For any 12-month period, the fees paid by such person with respect to any such cable service or other communications service shall not exceed 5 percent of such person's gross revenues derived in such period from the provision of such service over the cable system.

(i) Regulatory authority of Federal agencies

Any Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, except as provided in this section.

Section 635 of the Communications Act, 47 U.S.C. § 555

§ 555. Judicial proceedings

(a) Actions to review determinations by franchising authorities

Any cable operator adversely affected by any final determination made by a franchising authority under section 541(a)(1), 545 or 546 of this title may commence an action within 120 days after receiving notice of such determination, which may be brought in--

(1) the district court of the United States for any judicial district in which the cable system is located; or

(2) in any State court of general jurisdiction having jurisdiction over the parties.

(b) Available relief

The court may award any appropriate relief consistent with the provisions of the relevant section described in subsection (a) of this section and with the provisions of subsection (a) of this section.

(c) Review of constitutionality of sections 534 and 535

(1) Notwithstanding any other provision of law, any civil action challenging the constitutionality of section 534 or 535 of this title or any provision thereof shall be heard by a district court of three judges convened pursuant to the provisions of section 2284 of Title 28.

(2) Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of three judges in an action under paragraph (1) holding section 534 or 535 of this title or any provision thereof unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be

filed not more than 20 days after entry of such judgment, decree, or order.